

ARBITRATION DECISION NO.:

120

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Natural Resources

DATE OF ARBITRATION:

March 30, 1988

DATE OF DECISION:

April 13, 1988

GRIEVANT:

Hugh Wait

OCB GRIEVANCE NO.:

G-87-2464

ARBITRATOR:

Andrew J. Love

FOR THE UNION:

Allyne Beach

FOR THE EMPLOYER:

Jon E. Weiser

KEY WORDS:

Just Cause

Failure To Report To Work

Grievant Absent From Hearing

ARTICLES:

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

Article 25 - Grievance

Procedure

§25.02-Steps

FACTS:

At issue was whether the three (3) day suspension of the Grievant was without "just cause" and

therefore in violation of Section 24.01 of the Collective Bargaining Agreement; and whether the disciplinary action was commensurate with the offense. The Grievant was absent from the hearing for unknown reasons, and the agency argued that their case would be damaged by Grievant's absence.

The Grievant is a Carpenter I by job classification at the Ohio Department of Natural Resources. Grievant was responsible for repairing displays and being available to remedy general problems, such as minor electrical work. Events leading to this grievance occurred during the 1987 State Fair.

On August 13, 1987, the Grievant was scheduled to work at the fairgrounds from 8:00 a.m. to 4:00 p.m. At lunch, the Grievant's supervisor was informed by the Chief of Employee Services that the Grievant was attending a meeting. The supervisor went to the fairgrounds to look for the Grievant but was unable to find him. No other carpenters were at the fairgrounds at this time. The supervisor testified that it was a requirement that employees in the Office of General Services are to notify the immediate supervisor at that same office if there is a need for leave. This procedure allows the supervisor time to ensure that another can take over those particular job duties of the employee who had to take leave.

The following day, which was a Saturday, the Grievant was scheduled to work, however, the Grievant did not appear nor did he call in to indicate that he would not be at work on that day. Sometime after 9:00 a.m., the Grievant's supervisor was advised that the Grievant was unable to come to work because he had problems obtaining a baby-sitter. Once again the Grievant had notified the wrong party as to his inability to come to work.

The Grievant's supervisor testified that the Grievant knew that he could call into the radio dispatcher to leave a message that he would not be able to work. This was not done by the Grievant.

Management also had introduced a memorandum on the subject of absence without notification. This memorandum referred to an incident wherein the Grievant did not report to his work site at the State Fairgrounds and did not notify his supervisor or anyone else in the office that he would be unable to work. The memorandum stated that the Grievant was informed of the appropriate procedure to follow if he was unable to attend work.

Following his absenteeism, the Grievant gave his supervisor requests for leave for the days that were missed. Proper procedure calls for the leave requests to be given prior to the time leave is taken to ensure that the department is able to provide adequate coverage.

ARBITRATOR'S DECISION:

The agency argued that its case against the Grievant would be damaged without his presence. Section 24.01 of the parties' Collective Bargaining Agreement states: "The employer has the burden of proof to establish just cause for any disciplinary action."

Even if the Grievant were present, it is not required that he testify. The burden of proof of the existence of "just cause" remains with the employer, even if the Grievant presents no witnesses on his behalf. The Arbitrator then ruled that there was no requirement that the Grievant be present at the hearing.

It was the Arbitrator's opinion that the agency had met its burden of proof in establishing just cause for imposition of disciplinary action against the Grievant. The evidence is overwhelming that the Grievant was absent without leave and that he did not follow the procedures for notifying his immediate supervisor or the assistant chief of the office. In the absence of his supervisor, the Grievant was aware that he could leave a message with the radio dispatcher, who would deliver the message to the supervisor.

It was the Arbitrator's opinion that the disciplinary action taken was commensurate with the

offense. It was not clear to the arbitrator whether the management memorandum was intended to be a written reprimand. However, the Arbitrator did feel that the memorandum put the Grievant on notice of disciplinary action that could be taken if he continued to miss work without providing advance notice to his supervisor. The arbitrator felt that the grounds of the offense did not allow for the usual methods of progressive discipline under Section 24.02. In weighing the two (2) elements under Section 24.02 (discipline commensurate with the offense and progressive discipline) the Arbitrator felt that the nature of the offense and its seriousness must take priority with regard to discipline.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

ARBITRATION

**OHIO DEPARTMENT OF
NATURAL RESOURCES**

AND

**OCSEA LOCAL 11
AFSCME, AFL-CIO**

(Grievance of Hugh Wait)

ARBITRATOR:

Andrew J. Love

CASE NO.:

G87-2464

FOR DNR:

Jon E. Weiser

FOR GRIEVANT:

Allyne Beach

DECISION AND AWARD

The issues presented in this proceeding on March 30, 1988, are whether the three day suspension of the Grievant by the Ohio Department of Natural Resources (DNR) on October 20 through 22, 1987 was without "just cause" and therefore in violation of Section 24.01 of the parties' Collective Bargaining Agreement; and whether the disciplinary action taken was commensurate with the offense.

As a preliminary matter, representatives for the Grievant and DNR argued against and for dismissal of the Grievance, respectively, due to the absence of the Grievant. In the first instance,

this Arbitrator finds that DNR properly and timely notified the Grievant's representative as to the time, date, and location of this hearing. It was not stated as to why the Grievant did not appear. DNR stated that its case against the Grievant would be damaged without his presence. Although this Arbitrator is mindful of the fact that arbitrators' decisions whether to dismiss are relatively equal both ways, it is determined that DNR's position is not well taken in the instant matter. First, Section 24.01 of the parties' Collective Bargaining Agreement states:

The Employer has the burden of proof to establish just cause for any disciplinary action.

Even if the Grievant were present, it is not a requirement that he present testimony. The burden of proof of the existence of "just cause" remains with the Employer, even if the Grievant presents no witnesses on his behalf.

Second, Section 25.02 of the parties' Collective Bargaining Agreement defines and describes the procedure for the various grievance steps. At Step 5 (Arbitration), that section states as follows:

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of The Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four. (emphasis added)

In this Arbitrator's view, the above cited section imposes no requirement that the Grievant be present. According to Step Five, it is the obligation of the Union to provide appropriate notice. In the absence of definitive rules and/or regulations, one must logically conclude that the Grievant may not necessarily be present or called to testify in his own behalf. Therefore, it is this Arbitrator's opinion that this hearing shall proceed in the Grievant's absence.

A number of joint exhibits and exhibits by DNR and by the Grievant were later admitted into evidence.

As to the evidence presented, Mr. Jeff Hughes, DNR Office of General Services, stated that he is Grievant's immediate supervisor. The Grievant is a Carpenter I by job classification. Mr. Hughes stated that the Grievant's responsibilities at the State Fair in 1987 included repairing displays and being available to remedy general problems, such as minor electrical work. The Grievant was assigned to work at the State Fair in August, 1987. Mr. Hughes that, because of the large crowds and the number of displays presented by various agencies and organizations at the Fair, it was extremely important for the employees in the Office of General Services to be available for emergency repairs. In fact, it was sometimes required that two carpenters be present.

Mr. Hughes stated that the Grievant was scheduled to work on August 13, 1987 at the fairgrounds from 8:00 A.M. to 4:00 P.M. He testified that, while he was having lunch, Michael Canavan, Chief of Employee Services, notified him that the Grievant had a meeting. Mr. Hughes then went to the fairgrounds to look for the Grievant and could not find him. Mr. Hughes found Mr. Canavan who said that the Grievant left. No other carpenter was at the fairgrounds during this time. Mr. Hughes stated that Mr. Canavan is not in the same office of that of the Grievant. He stated that it was a requirement that employees in the Office of General Services are to notify the immediate supervisor of that same office if there is a need to leave. In that way, the immediate supervisor can summon another individual to take over those particular job duties of the employee who had to take leave.

On August 14, 1987, Mr. Hughes stated that the Grievant was scheduled to work on that day. Mr. Hughes decided to be at the fairgrounds on August 14, 1987, at the time that the Grievant was to arrive for work at 8:00 A.M. By 8:30 A.M., the Grievant did not appear for work and Mr. Hughes

returned to his office. The Grievant had not called in to indicate that he would not be at work on that day.

On Saturday, August 14, 1987, the Grievant was scheduled to work again. Mr. Hughes stated that the Grievant requested to work on this day. Mr. Hughes further testified that Saturday during the State Fair is a very busy day. This day required two carpenters to be present. On this day, however, one carpenter was present, but the Grievant did not come to work. Sometime after 9:00 A.M., Carl Miller, of Civilian Conservation, advised Mr. Hughes that the Grievant had contacted him stating that the Grievant had problems obtaining a baby-sitter and could not work on this day. Mr. Miller, who is involved with a different office, is not the person to whom the Grievant is to notify about his inability to come to work. The Grievant is supposed to report to his immediate supervisor in the Office of General Services. Mr. Hughes testified that the Grievant knows that he can call into the radio dispatcher to leave a message that he would not be able to work. This was not done by the Grievant. In addition, Mr. Hughes testified that he had discussed call-in procedures with the Grievant in the past. See Management Exhibit No. 10, wherein Mr. Dale E. Balsler, Assistant Chief of the Office of General Services, prepared a Memorandum on the subject of absence without notification. In that communication, Mr. Balsler referred to a July 1, 1986 incident wherein the Grievant did not report to his work site at the State Fairgrounds and did not notify his supervisor or anyone in the Office of General Services that he would not be at work. That communication goes on to say that Mr. Balsler and Mr. Hughes talked to the Grievant at that time about the procedure to be employed if one cannot attend work on a given day.

Mr. Hughes testified as to his receipt of leave requests from the Grievant on August 18, 1987 for the days of absenteeism covering August 13 through 15, 1987. Mr. Hughes testified that, under normal circumstances, leave without pay requires advance notice. Here, the leave request came after the leave was taken. It should also be noted that, in respect to management Exhibit No. 7, the Grievant listed illness as the basis for his request for leave on August 13, 1987. However, the Grievant had advised Mr. Canavan (again, not in the office where the Grievant works) that he had to attend a meeting. His other leave requests indicated personal business for the August 14, 1987 date and no baby-sitter for August 15, 1987.

Mr. Ronald Bruce, testifying on behalf of the Grievant, stated that he is a Radio Technician I and has been employed with DNR for 11 years. On August 13, 1987, Mr. Bruce came to DNR to pick up his paycheck from the secretary who advised Mr. Bruce that the Grievant was on the phone and wanted to speak with Mr. Balsler or Mr. Hughes. Neither of these gentlemen were in at the time.

On cross-examination, Mr. Bruce stated that he is not required to call individuals who do not work in his unit if he is unable to work on a given day or at a given time of the day. Furthermore, he testified that he should contact the Radio Dispatcher if he could not contact his immediate supervisor. This is also the requirement of the Grievant if he cannot work on a given day or at a given time during the day.

As to the determination as to whether "just cause" existed for the imposition of disciplinary action against the Grievant, this arbitrator finds that DNR has met its burden in establishing that issue. The evidence is overwhelming that the Grievant was absent without leave in that he did not follow the procedures for notifying his immediate supervisor or the assistant chief of his office, to wit: Mr. Balsler. The Grievant was certainly aware of the procedure for call-in in order to notify the appropriate individuals in his own unit. In the absence of Mr. Hughes' availability, the Grievant was aware that he could call the radio dispatcher and that the message would be delivered to his immediate supervisor or to Mr. Balsler. On none of the days in question was this done. Moreover, the reason for the leave request for August 13, 1987 (sickness) is at odds with what was represented to Mr. Hughes by Mr. Canavan (attending a meeting).

In regard to the second issue, i.e. whether the disciplinary action taken was commensurate with

the offense, this Arbitrator considers at least one previous warning to the Grievant, which, coincidentally, concerned a similar leave without notice during the 1986 Ohio State Fair. The Grievant was aware of the potential disruption of the normal ongoing events during the State Fair when no one would be available to take care of emergency needs, pursuant to the Grievant's job skills and duties. It is not clear whether the communication, marked as Management Exhibit No. 10 is part of the Grievant's personnel file. Hence, it is not clear whether this communication constitutes a written reprimand. However, it clearly states that the Grievant is put on notice of disciplinary action that could be taken if he continued to engage in this type of conduct. This Arbitrator is mindful of the problems that an employee's leave without notice can do to the orderly process of events in a certain situation, the Ohio State Fair in particular. It is therefore the view of this Arbitrator that, given the circumstances of the Grievant's absence without notification for a period of three consecutive days, that the disciplinary action taken was commensurate with the offense. In determining thus, this Arbitrator must weigh the gravity of the offense with the principles of progressive discipline as stated in Section 24.02 of the parties' Collective Bargaining Agreement. As previously stated, it is clear that the Grievant was aware of the problems that he would create if he did not follow proper notification procedures. It is important to note that the above referred section requires, first, that disciplinary action shall be commensurate with the offense. It then goes on to cite the progressive discipline schedule. The obligation of DNR is to determine whether the usual steps of progressive discipline can be applied in the instant case. From the evidence adduced, it is clear that the gravity of the offense does not allow for the usual methods of progressive discipline. Hence in weighing the two elements under Section 24.02 (discipline commensurate with the offense and progressive discipline) the nature of the offense and its seriousness must take primacy with regard to discipline. Accordingly, the disciplinary action imposed by DNR is commensurate with the offense and is not violative of Section 24.02 of the parties' Collective Bargaining Agreement.

Accordingly, the grievance is DENIED.

ANDREW J. LOVE, Arbitrator