

ARBITRATION DECISION NO.:

189

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Western Reserve Psychiatric
Habilitation Center

DATE OF ARBITRATION:

June 23, 1989

DATE OF DECISION:

July 12, 1989

GRIEVANT:

Michael Flinn

OCB GRIEVANCE NO.:

23-18-(88-04-19)-0064-01-04

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Myrl A. Lockert, Advocate

FOR THE EMPLOYER:

George R. Nash, Advocate

KEY WORDS:

Section 24.01, Just Cause
Suspension
Tardiness
Late Call Off
Failure To Submit Leave Slips
Disparate Treatment
Civil Rights Commission Ruling

ARTICLES:

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

§24.05-Imposition
of Discipline

§24.06-Prior
Disciplinary Actions

FACTS:

Grievant was a Therapeutic Program Worker (TPW) at the Western Reserve Psychiatric Habilitation Center (WRPHC). The grievant was suspended for six days for failing to turn in four leave forms for three sick days, and tardiness, and for calling off late on two of the four days.

EMPLOYER'S POSITION:

The sole witness for the State was grievant's immediate supervisor at the time of the discipline. The witness had not assumed this position until a few months prior to the disciplinary action. The supervisor testified about the critical importance of the TPW's function within the institution and the ramifications of late or non-reporting to work. The witness further testified that the grievant was aware of WRPHC absenteeism policy - policy #2-9.

UNION'S POSITION:

Grievant acknowledged that on four occasions he had not submitted the proper leave form and that on two of the occasions he had called-off late. The grievant argued that these infractions should not have led to discipline given three mitigating factors.

First, the grievant testified that he had not fully understood leave form requirements and that, when he had been counseled about absenteeism in the past, these requirements had not been spelled out to him. Another witness, also a TPW and a union official, testified that the union believed discipline for absenteeism and related offenses to be inconsistent and arbitrary. The union introduced leave records and disciplinary records of six other employees to support their claim.

The union introduced a finding by the Ohio Civil Rights Commission where, in response to a complaint by the Grievant, the Commission found evidence of inconsistency and arbitrariness of discipline at the institution.

ARBITRATOR'S OPINION:

The arbitrator referred to Center Policy #2-9. Center Policy #2-9 defines absenteeism as "Failure to call off" and "Failure to submit a complete request for leave form with required supporting statements."

The arbitrator did not find a clear statement in 2-9 that the leave form had to be turned in for every absence. Further, despite the potential for inferring this rule from the policy, and the grievant's potential for learning about this rule in his eight years with the Center, the arbitrator stated that "the employer is not allowed to rely on notice of a rule transmitted by either inference or long time experience." Further, the Employer presented no evidence that grievant had been trained on Center Policy 2-9.

The arbitrator found the supervisor's testimony - that he had discounted the 14 month improvement in the grievant's record because he concluded that "had he been grievant's supervisor previously, he would have disciplined the grievant for absenteeism offenses during that period" - to be of serious concern. Arbitrator felt that this violates basic notions of fairness implicit in "just cause", by which a member of management is bound by the employer's records and past actions.

The arbitrator found that the discipline records, admitted as the grievant's total records, showed

a significant number of incidents where leave forms had not been submitted and (apparently) disciplinary action had not followed. Also, the arbitrator found that the records contained discrepancies with regard to disciplining other employees. The employer was unable to explain these discrepancies convincingly. Hence, the arbitrator found the records to provide prima face evidence of disparate discipline. The arbitrator did also give some weight to the OCRC report submitted as evidence by the union, without objection by management.

The arbitrator concludes that: "(T)he grievant, in this case, was unfairly treated when his supervisor attempted, in essence, to punish the Grievant for his past supervisor's alleged failures. This unfair treatment was compounded by rather overwhelming evidence, not clearly refuted by the Employer, of disparate discipline practices within the institution."

AWARD:

Grievance was sustained. Grievant was to be made whole and the suspension expunged. He shall suffer no loss of seniority and shall be credited with any loss of sick, vacation, or personal leave.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11,
AFSCME, AFL-CIO**
Union

and

Department of Mental Health
Employer

Grievance No.:
23-18-(4-19-88)-0064-01-04

Grievant:
(Flinn)

Hearing Date:
June 23, 1989

Opinion Date:
July 12, 1989

For the Union:
Myrl A. Lockert, Advocate

For the Employer:
George R. Nash, Advocate

In addition to the Grievant Michael Flinn and the advocates, the following persons were in attendance at the hearing: John Porter (OCSEA), Robert Robinson (WRPHC) - witness, Tim Wagner (OCB), Betty Lou Milstead (WRPHC) - witness, Paul McDowell (WRPHC) - witness.

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn. Neither party requested that witnesses be sequestered.

Issue

The parties stipulated to the issue:

Was the six (6) day suspension served by the Grievant for just cause? If not what shall the remedy be?

Joint Exhibits

The parties jointly introduced the following exhibits:

1. Union Contract
2. Policy #2-9 Absenteeism: Western Reserve
3. Disciplinary Trail
 - A. Pre-disciplinary Conference Notice
 - B. Notice of Disciplinary Action Recommendation
 - C. ODMH Letter of Suspension from Director
 - D. Chief Executive Officer order of Suspension
 - E. Absence from Work Reports (4) (2/17/88, 3/8/88, 3/10/88, and 3/11/88)
 - F. McBee Card (Payroll)
 - G. Record of Prior Discipline
4. Grievance Trail
 - A. Grievance
 - B. Assignment Sheet
 - C. Step 3 Answer
 - D. Step 4 Answer
 - E. Request for Arbitration
5. McBee Cards
 - Leave Slips, Prior Discipline up to 4/1/88 (Hiram Burr, Sandra Fikes-Jackson, Debra Wissmer)
 - McBee Cards
 - Prior Discipline up to 4/1/88 (Laura Lowe, Terri Sykes, Sharon Edwards)

Stipulations of Facts

The parties jointly stipulated to the following facts:

1. Mr. Flinn began employment at the Western Reserve Psychiatric Habilitation Center October 5, 1981.
2. Mr. Flinn is currently classified as a Therapeutic Program Worker.

Relevant Contract Sections

§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 the 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 situations 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 records placed in an employee's file prior to the effective date of this Agreement.

Facts

The Grievant is a Therapeutic Program Worker (TPW) at the Western Reserve Psychiatric Habilitation Center (WRPHC). At the time of the events underlying this grievance, the Grievant was assigned to the Float Pool and worked the first shift (7:00-3:30). The Grievant is an eight (8) year employee. On April 7, 1988, the Grievant was suspended for six (6) days. The stated reason for the suspension was

[] In a four week period you were in an out of pay/unapproved leave status on four occasions and failed to submit documentation to justify your absence. (Joint Exhibit 3(c).)

More specifically, the Grievant's infractions were

1988 February 17 Sick - out of pay, no leave slip submitted (Sick/Vacation time available)

March 8 Sick - late call-off; out of pay, no documentation (leave slip/ doctor's slip) submitted (Vacation time was available)

March 10 Sick - out of pay, no documentation submitted (leave slip/doctor's slip (Vacation time was available)

March 11 Late with notice 1.5 Hours - out of pay, no documentation submitted (leave slip/doctor's slip) (Vacation time was available)
(Joint Exhibit 3A)

The Union and the Grievant acknowledged at the outset that Grievant had committed these infractions. The evidence presented focused on issues of mitigation:

1. the Grievant's alleged misunderstanding of the rules of documentation, and
2. the Grievant's improved discipline record.

The Union also charged that the discipline was inconsistent and arbitrary when compared to discipline imposed on other employees at WRPHC.

For the Employer, Paul McDowell, a Mental Health Administrator I, (a twenty-eight (28) year employee at WRPHC) testified. At the time of the events at issue, Mr. McDowell was the Grievant's immediate supervisor. Mr. McDowell was Coordinator of Central Staffing at the hospital and directly supervised a float pool of TPW's who were assigned by him to various units on a daily, as needed, basis. Mr. McDowell testified at length to the critical importance of the TPW's function as the hospitals primary direct care employee. He indicated that lateness and absences put a strain on the ability of the hospital to adequately provide direct care. The failure to report for duty or being late caused other employees to be held over and cost the hospital overtime.

Mr. McDowell testified that the Grievant "was aware" of Center Policy #2-9 (Joint Exhibit #2).

Mr. McDowell said that as the Supervisor of the Grievant, his duty included recommending that discipline be imposed. He said that after the four events at issue he reviewed the Grievant's prior disciplinary record.

The record is

Date/Corrective Action Taken/Charge

9/24/84 Letter of Reprimand/Neglect of Duty - Abandoning Work Area
9/18/85 Verbal Reprimand/Attendance
10/11/85 Verbal Reprimand/Incomplete Documentation
11/08/85 Letter of Reprimand/Attendance
3/24/86 Verbal Reprimand/Attendance
4/08/86 Letter of Reprimand/Tardiness/Abandoning Work Area
4/11/86 Letter of Reprimand/Abandoning Work Area
10/29/86 Two (2) Day Suspension/Attendance
11/04/86 Verbal Reprimand/Neglect of Duty
12/15/86 Two (2) Day Suspension/Tardiness/Abandoning Work Area/Leaving Work
Early

(Joint Exhibit 3G)

Mr. McDowell indicated under cross-examination that he also reviewed the Grievant's leave record between 12/15/86, the date of the last discipline, and February 17, 1988, the first incident at issue. During almost all of this period, Mr. McDowell was not the Grievant's supervisor. (Mr. McDowell said he became the Grievant's supervisor in early February, 1988.) Mr. McDowell said that the absence of discipline between 12/15/86 and 2/17/88 did not constitute an improvement. He said that when he reviewed the Grievant's work record between 12/15/86 and 2/17/88 that he (Mr. McDowell) concluded that had he been the Grievant's supervisor he would have disciplined the Grievant during this period. Mr. McDowell said that his decision to recommend discipline for the February-March events was based on this review of the Grievant's prior leave records and his (Mr. McDowell's) conclusions.

Mr. McDowell said he had no knowledge of the consistency of discipline outside his department. He indicated that he disciplined consistently within his department. Mr. McDowell was the Employer's sole witness.

The Grievant admitted that on the four occasions he had not submitted the proper leave form and that on two of the occasions he had called-off late. He maintained that he had not understood that he had to submit the leave form when he did not wish that the time be deducted from current leave balances. He said he believed that if he did not submit the form, the missed time would be automatically LWOP. (In fact, time is subtracted from whatever leave balances exist until those

balances are exhausted. Only then is LWOP utilized.) On cross-examination, Grievant maintained that previously (1986) he had been counseled about absenteeism but that the leave form requirements had not been explained. He said that he now understood that a leave request form had to be submitted for every absence regardless of the cause and regardless of his personal desire as to how the absence be classified.

The Grievant's testimony, together with a colloquy at the hearing between the Grievant, Mr. McDowell, and Ms. Milstead, indicated that all parties agreed that the Grievant had been fully trained on the leave form after the imposition of discipline in this matter.

Robert Robinson, a TPW and Union official, testified that the Union believed that discipline at WRPHC for absenteeism and related offenses was inconsistent and arbitrary. The Union introduced the leave records and disciplinary records of six (6) other employees. The Employer stipulated to those records which basically indicated significant differences in discipline for widely varying absenteeism records. The Employer and the Union agreed that these workers were not disciplined by Mr. McDowell. The Employer noted that the records would not reveal mitigating circumstances which affected the discipline of individual employees. The Union also introduced a finding by the OCRC (Union Exhibit 2) where, in response to a complaint by the Grievant, the Commission found evidence of inconsistency and arbitrariness of discipline. However, the OCRC declined to act because no evidence of racial discrimination was found in the arbitrary and inconsistent discipline.

Discussion

The Grievant was suspended for six (6) days for failing to turn in four (4) leave forms for three (3) sick days and one (1) late day and for calling off late on two (2) of the four (4) days. Center Policy #2-9 defines absenteeism as including A3 "Failure to call-off" and A4 "Failure to submit a complete request for leave form with required supporting statements." Grievant's six (6) day suspension occurred fourteen (14) months after his last suspension of two (2) days for a similar offense. Grievant claims he did not understand that he had to submit a leave form if he did not wish that the time be subtracted from leave balances. Employer claims that this requirement is obvious from Center Policy #2-9 and that given Grievant's past absenteeism discipline he was clearly on notice of the form requirement. Employer presented no evidence that Grievant had been trained on Center Policy 2-9.

The Arbitrator's reading of Center Policy 2-9 does not find a clear statement that the leave form had to be turned in for every absence. However, arguably this rule could be inferred from A4. The Arbitrator finds it hard to believe that in eight (8) years the Grievant had not learned this rule. However, the Employer is not allowed to rely on notice of a rule transmitted by either inference or long time experience. The Arbitrator finds it inappropriate that the only proof of a complete training of the Grievant on Center Policy 2-9 showed the training was given after the discipline.

Assuming that Grievant was on notice about the form rule, albeit informally, the testimony reveals a more serious problem. The member of management responsible for initiating the discipline of Grievant admitted that he discounted the 14 month improvement in Grievant's record because he concluded that "had he been Grievant's supervisor previously, he would have disciplined the Grievant for absenteeism offenses during that period." This conclusion violates basic notions of fairness implicit in "just cause". A member of management is bound by the Employer's records and actions. A manager cannot arbitrarily and capriciously impose what amounts to "ex post facto" punishment to remedy what in his mind were past management failures. Perhaps a manager relying on the formal record would have merely verbally counseled the Grievant that his 14 month improvement was slipping. Perhaps a verbal counseling at some

point would have brought to Grievant's knowledge, clearly and unambiguously, the leave form requirement.

To accurately assess the evidence of the Union on inconsistent discipline on absenteeism is difficult. However, since the employer stipulated that the records provided are the total records for the employee at issue, the Arbitrator did note significant number of incidents where apparently no leave form was submitted by an employee for an absence. Secondly at least prima facie, the records appear to show disparate discipline. The Employer offered no evidence to explain away these apparent discrepancies other than to suggest the potential of individual mitigating circumstances. The Arbitrator gives some weight to the finding made by the OCRC which was introduced into evidence without objection. An independent agency, albeit seeking a different problem, found evidence of "inconsistency and arbitrariness" with regard to discipline for "attendance infractions" (Union Exhibit 2).

An implicit component of "just cause" is that equal infractions receive equal discipline. Fair discipline is even discipline. Inconsistent discipline could lead employees to suspect favoritism. Moreover, inconsistent discipline undermines the concept of "notice". When an employee sees another employee undisciplined for infractions, a logical inference would be that the employer has "waived" application of that rule. Over time, such a "waiver" could lead to the conclusion that the "rule" no longer existed. In essence, failure to discipline consistently can constitute "notice" that the rule no longer exists.

The Grievant, in this case, was unfairly treated when his supervisor attempted, in essence, to punish the Grievant for past supervisor's alleged failures. This unfair treatment was compounded by rather overwhelming evidence, not clearly refuted by the Employer, of disparate discipline practices within the institution.

Award

Grievance sustained.

Grievant is to be made whole and the suspension expunged. He shall suffer no loss of seniority and shall be credited with any loss of sick, vacation, or personal leave.

July 12, 1989

Date

Rhonda R. Rivera

Arbitrator