ARBITRATION DECISION NO.:
232

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

EMPLOYER:
Department of Rehabilitation
and Correction
Southeastern Correctional
Institution

DATE OF ARBITRATION:
January 19, 1990

DATE OF DECISION:
February 19, 1990

GRIEVANT:
Kenneth Whaley

OCB GRIEVANCE NO.:
27-24-(89-03-20)-0018-01-03

ARBITRATOR:
Jonathan Dworkin

FOR THE UNION:
John C. Fisher
Staff Representative
Yvonne Powers
Assoc. Gen. Counsel

FOR THE EMPLOYER:
Joseph B. Shaver
Asst. Chief, Labor Relations
Lou Kitchen
Labor Relations Specialist

KEY WORDS:
Removal
Improper Job Performance
Just Cause

ARTICLES:
Article 24-Discipline

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

FACTS:

The grievant is a Correction Officer employed by the Ohio Department of Rehabilitation and Corrections. He was assigned to secure the classrooms at the facility. An inmate was discovered missing and found hiding in a classroom the grievant had secured. This incident caused delays in meals and evening programs. The grievant was dismissed for violations of the Standards of Employee Conduct, rules 4, 6 and 36.

EMPLOYER'S POSITION:

There is just cause for dismissal. The grievant is responsible for security of the classrooms. The fact that an inmate was found hiding in a classroom after it was secured is evidence of the grievant's negligent performance of his duties. The grievant is aware of his duties as he has eight years experience. Progressive discipline is not violated by removal, as the grievant has prior discipline.

UNION'S POSITION:

There is no just cause for dismissal. The school security officer is not primarily responsible for securing the classrooms. The employer's disregard of its inmate check-in, check-out procedure caused the incident. There is no proof that the inmate in fact was in the room when the grievant secured it. Therefore, the grievant's actions were either not negligent or did not cause the incident.

ARBITRATOR'S OPINION:

The grievant was careless and negligent in securing the room. The violation is not trivial as one of the most important tasks of the grievant is "keeping people here." The union's argument that the harm caused was slight, is not well taken. Discipline is given for negligent job performance regardless of the consequences. Disparate treatment was, not proven. Progressive discipline was not violated, as the grievant has prior discipline. No mitigating factors are found in the grievant's work record. Therefore, there is just cause for dismissal.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

STATE OF OHIO
Department of Rehabilitation
and Correction

Lancaster, Ohio

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION OCSEA/AFSCME, AFL-CIO Local 11

Case No.:
27-24(03-20-89)18-01-03

Decision Issued:
February 19, 1990

APPEARANCES

FOR THE EMPLOYER

Joseph B. Shaver, Assistant Chief, Labor Relations
Dave Crabtree, Administrative Captain
Ben Bower, Warden
Dave Brown, Correction Officer II
Louis E. Kitchen, Labor Relations Specialist

FOR OCSEA

John C. Fisher, Staff Representative
Yvonne Powers, Associate General Counsel
Floyd W. Gray, Correction Officer II
Kenneth Whaley, Grievant

ISSUE:

Article 24 -- Removal

Jonathan Dworkin
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SUMMARY OF DISPUTE

The grievance stems from the removal of a Correction Officer formerly employed at the Southeastern Correctional Institution in Lancaster, Ohio. Southeastern is a medium security adult prison which houses approximately fifteen hundred inmates. Grievant was one of the Institution's more than three hundred employees. As a Correction Officer, his main duties were to provide

security and police prisoner activities.

The discharge was for carelessness. One of Grievant's responsibilities was to examine school classrooms after prisoners left, assure that they were "secure," and then lock the rooms. On January 12, 1989, when he supposedly inspected a classroom and declared it "secure," he failed to detect an inmate hiding under a lab table. The inmate was in the process of trying to escape. His absence was noticed when the 4:30 p.m. count came up short. At that point, prisoners were locked in their cells while the grounds and buildings were searched. The missing inmate was discovered approximately forty-five minutes later. Meanwhile, the institutional routine had been disturbed. Mealtime was delayed, an event which can lead to dangerous reactions. Scheduled evening programs, such as meetings of Alcoholics Anonymous and Narcotics Anonymous, were delayed as well.

After investigating, the Employer concluded that Grievant's neglect was responsible for the security breach. His duty was to perform detailed classroom searches before leaving the school building, and it was apparent to the Administration that he had done less than was expected. In the Step 3 grievance meeting, he himself admitted he had not looked under the lab table before certifying that the room was secure. He explained that his schedule allowed him only fifteen minutes to check fifty-six classrooms before his shift ended; there was simply not enough time to perform the job thoroughly. The Employer's Step 3 designee was unsympathetic. He held that the time constraints were not equivalent to authorization for shoddy security work. His written findings included the following:

"In the opinion of the hearing officer, there exists a post order . . . which states, "upon completion of classes and the students are checked out and teachers have left the building, the officer will make a security check and a fire check and properly secure the A-4 section and report to the shift commander." The duty and responsibility is clear. The argument of insufficient time to do the job is inappropriate. If management requires that the school is to be checked and be security cleared, the job required to be done is more important than the time it takes to do it. If the job takes longer than the given time, management must be made aware of such and would then need to alter the procedure or grant overtime."

Assuming Grievant did commit negligence (an assumption the Union vigorously disputes) his single act of misconduct in eight years of employment would not have justified the discharge. But the discipline was not premised on one occurrence. It was the culmination of a checkered employment record which included four previous incidents of progressive discipline in less than a year. Grievant was reprimanded twice on March 31, 1988 for two separate violations; additionally, he received a three-day suspension on July 25, 1989 and a five-day suspension on February 27, 1989. The disciplinary events were similar; carelessness was the common factor. The Institution recommended Grievant's removal because it saw no alternative. The Employee seemed impervious to counselings, warnings, and corrective discipline. He was regarded by Supervision as incorrigible. Moreover, he had exceeded the limit of progressive disciplinary stages. As the Warden commented in the arbitration hearing, "He got what the book called for."

The "book" the Warden referred to is a list of employment rules and progressive penalties. It was created unilaterally by the Employer, and the Union correctly points out that it is not the "book" which ultimately governs this dispute. The Collective Bargaining Agreement between the parties supersedes any regulations of Management. Article 24 of the Agreement, the Discipline Clause, contains the language upon which the Award will be based. It provides in pertinent part:

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.

. . .

§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.

. . .

§24.05 - Imposition of Discipline

. . .

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

Grievant's defense centers on just cause. The Union points out that, first and foremost, just cause for discipline does not exist with respect to an employee who does nothing more than fulfill his duties with reasonable care and competency -- an employee who commits no misconduct. According to the Union, Grievant did nothing wrong on January 12; he followed the Institute's orders and written procedures.

Second, the Union maintains that Grievant was the victim of disparate treatment. Others failing to intercept attempted escapes in the past were not disciplined. This case is an example of such disparity. Grievant was not the only one obligated for school security. Teachers were supposed to thoroughly check their classrooms before leaving.

Third, the Institution systematically disregarded its own security procedures and contributed markedly to the failure to detect the missing inmate. According to the Union, Grievant was made the scapegoat for the event although his contribution was minimal at best.

The Union concludes that all of these factors demonstrate lack of just cause and require an award sustaining the grievance. The Union demands that Grievant be reinstated with full seniority, together with lost wages and benefits.

The grievance was presented to arbitration on January 19, 1990 in Columbus, Ohio. At the outset, the parties stipulated that the dispute was arbitrable and the Arbitrator was authorized to issue a conclusive award on its merits. It is to be observed that arbitral jurisdiction is more specifically defined and limited by the following language in Article 25, §25.03 of the Agreement:

"The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/ she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement."

EXAMINATION OF THE CHARGES AGAINST GRIEVANT;
PRELIMINARY ARBITRAL CONCLUSIONS

Although negligence was the fundamental reason for Grievant's removal, the Employer formalized its allegations of misconduct by tying them to the Standards of Employee Conduct published and distributed by the Ohio Department of Rehabilitation and Correction. The Standards were not negotiated but had been in effect since 1987. They were communicated to all employees to clarify the manner in which Management intended to exercise its authority to govern the workforce and apply discipline. On October 30, 1987, Grievant signed a memorandum acknowledging receiving a copy of the document.

Grievant was charged with violating four separate items in the Standards:

4. Carelessness resulting in loss, damage, unsafe act, or delay in work production including State vehicles.

. . .

6. Insubordination-

a. Failure to carry out work assignment.

. . .

c. Failure to follow post orders, administrative regulations and/or written policies or procedures

. . .

36. Any act or commission not otherwise set forth herein which constitutes a threat to the security of the institution, its staff, or inmates.

Obviously, the Agency was exhaustive in developing its case against Grievant. In reviewing the charges, however, the Arbitrator finds that the Employer alleged too much. The facts supporting the discharge indicate that Grievant may have been negligent. If so, he was guilty of violating Rule 4. But there are no facts supporting the additional charges under Rules 6 and 36. Those charges are summarily dismissed for the following reasons:

Rule 6 is entitled "Insubordination." Grievant was charged with breaches of subsections a and c of the Rule, both of which are designated as forms of insubordination. Whatever Grievant did or did not do, he was not insubordinate. That category of misconduct is characterized by intentional defiance of authority -- rebelliousness. Insubordination does not exist unless an employee's violation contains elements of deliberateness and/or willfulness. The State's contention is that Grievant was unduly careless of his obligations, not that he purposely failed to perform them. Therefore, the charges of insubordination obscure the determinant issue and will not be considered.

Rule 36 is a kind of omnibus provision designed to cover serious misconduct not specified in other regulations. It is phrased as such. It begins, "Any act or commission not otherwise set forth herein . . ." The allegation against Grievant is that he carelessly omitted duties, thereby causing a delay in "work production." That accusation is fully comprehended by Rule 4. It stands to reason that a violation which fits entirely into Rule 4 cannot be an act "not otherwise set forth" in the Employer's list of regulations. The Arbitrator concludes that the Rule 36 charge is excessive and inconsistent with the evidence against Grievant.

These findings and exclusions significantly narrow the issues to be decided. The award in this dispute will stem from the answers to three questions: 1) Was Grievant negligent in the performance of his duties? 2) Did the removal comport with the progressive discipline formula in Article 24, §24.02? 3) Was the removal consistent with the just-cause requirements of Article 24,

§§24.01 and 24.05?

ADDITIONAL FACTS AND CONTENTIONS

The contention that Grievant violated his responsibilities is based upon facts which are not materially in dispute. The Employer's case is uncomplicated. It alleges that Grievant's fundamental obligation was to make sure the classrooms were secure. That included inspecting under the lab table. Since he did not look under the table, he performed his job negligently.

Grievant admits he did not look under the table but insists that he did make a reasonably complete inspection. His normal procedure at the end of the shift was to go through the building and make a "complete check" looking for stray inmates. He claims he did just that on January 12. When he came to the classroom in which the inmate was later discovered, he first walked around, looking every-where. He checked the bathroom and closets. He inspected the lab table and its "dry sink" indentation. He did not look behind or under it because it was pushed against the wall and was quite heavy. When he finished, he locked the room from the outside.

The Employer doubts Grievant's testimony. It notes that the first time he mentioned even looking at the lab table was in the arbitration hearing. That was new testimony which was not brought out in the contractually required pre-disciplinary hearing or the Step 3 grievance meeting. The Employee's statements are also contrary to observations made afterwards. Most notably, the table was not against the wall when the inmate was found.

Even if Grievant's testimony is accepted as true, the Agency continues to stand firm on its contention that the Employee was negligent. He was not a neophyte; he had eight years' experience as a Correction Officer. Shortly before January 12, he completed six full months in the school-building assignment. He knew his responsibilities. He fully understood that he was to inspect the classrooms in minute detail. Looking under a lab table was not an unusual aspect of the job -- it was basic to it.

According to the Employer, Grievant cavalierly neglected his obligations. He did not assure that the rooms were secure; he assumed they were. In all probability, he simply glanced inside each room and then locked it.

The Employer argues that such careless disregard for duty was typical of Grievant's career. His record contained eight years of marginal evaluations. The last one was discussed with him on January 12, 1989, <u>just hours before he committed the violation leading to his dismissal</u>. His ratings were marginally poor on almost every subject of evaluation. The main criticisms were in the areas of dependability ("Needs Improvement") and judgment ("Limited Judgment"). The pointed remarks of the Major who reviewed the evaluation should have served as enough warning for at least the remainder of the January 12 shift. It stated, "This officer needs improvement in all areas at once. [After] 8 years of experience he should be a better officer." The Appointing Authority added the following commentary, "Not much of an evaluation for an employee with 8 years of experience. Improvement expected <u>immediately</u> in all categories."

It is inconceivable to the Employer that Grievant did not understand his duties. The 1989 appraisal did no more than restate what was characteristic of almost all previous evaluations of this Employee since he completed probation in 1981. Moreover, his disciplinary record in the twelve months preceding January 12 justified more than a suspicion that his inadequacies were the products of arrogance and indifference. His first verbal warning was for a Rule 4 violation which occurred on March 11, 1988. The official report describes what happened:

"Sir: On the date and time, Ms. Kearns and myself discovered that [an inmate] was spraying water on the ceiling tile, lights, a stored organ, other equipment stored and the walls in the old masonry shop. The water was dripping off the lights. Water was standing on approximately one

half the floor space. [Grievant] was to oversee the job that was being done. I asked [Grievant] where the hose came from and he stated that the hose belonged to the chow hall. [Grievant] also stated he told the inmate to just wash the walls. Do [sic] to the nature of this incident, the inmate could have been shocked or electrocuted by spraying water on the fluorescent lights and bus bars. This is another example of [Grievant's] inability to oversee or control inmates and/or situations that are part of his daily routine."

Neglect of duty was the reason for Grievant's second verbal warning. He had been assigned to oversee a cleaning and janitorial project in the school building. The actual work was to be performed by porters (inmates), but Grievant was responsible for its completion. The job was to be finished on March 11. On March 15, the Assistant School Facilitator conducted an inspection. He found that most of the areas which were to have been cleaned were still dirty and in shambles. Grievant offered no explanation. He declined even to answer when the assignment might be completed.

A three-day suspension was issued for negligence on July 8, 1988. Grievant collided with another vehicle while driving the trash truck on May 13. An investigation disclosed that the accident would not have occurred if Grievant had bothered to look through his side view mirror before backing.

On December 6, 1988, the Employee neglected to carry a working radio while supervising a prisoner work detail off Institution grounds. On December 12, he neglected to follow rules regarding his duty to turn in keys when his shift ended. A one-half hour delay in "production" resulted. The Agency's response to those instances of carelessness was to issue a ten-day suspension. It was reduced to five days during subsequent grievance discussions.

Against this backdrop, the Agency felt it had no real alternative but to discharge Grievant for yet another act of negligence on January 12. The Employee had run through the corrective-discipline cycle without achieving correction. Counseling had been no help at all. In fact, according to his evaluator, Grievant characteristically shunned advice. His pattern of carelessness and indifference had become hopeless in the Employer's judgment.

*

The Union asks the Arbitrator to be mindful of the fact that Grievant's past record has no relevancy if there was no violation to trigger his dismissal. According to the Union, there was none; Grievant fully performed his duties. He was not responsible for the attempted escape, nor was he primarily to blame for failing to discover the missing prisoner. His job was not to make "shakedown" inspections of classrooms, it was to make "visual" inspections, and the latter is less detailed or complete than the former. The first-shift security officer assigned to the school building serves as back-up security, not primary; it is the teachers who are to make the more complete checks on their rooms before leaving. The Union maintains that, in reality, Grievant did what he was supposed to do and was punished for the classroom teacher's neglect.

In addition to the teacher's carelessness, the Union contends that the Administration's disregard for its own security policies may have caused the incident for which Grievant was dismissed. The Post Orders, which are published and distributed to all Correction Officers, contain the following regulation:

SPECIFIC ORDERS OF SCHOOL SECURITY OFFICERS

A.) FIRST SHIFT SCHOOL SECURITY OFFICER

. . .

7.) The Officer will check inmates in and out, sign and issue all school passes.

The Union points out that this is a prudent security measure. If followed, it provides the assigned officer with a handle on who might be in the building at any particular time. If a sign-in list had been provided, Grievant would have realized much sooner that an inmate was missing and the "production" delay could have been avoided. But the Institution never followed the rule. Sign-in lists are not distributed or used and, without them, it is impossible for Grievant or any other Correction Officer to keep track of student-inmates.

Finally, the Union contends that the case against Grievant is predicated on unproven speculation and has been vastly overblown by the Employer. The Union argues that there is no proof the inmate was underneath the lab table when Grievant locked the classroom -- the assertion that he was is an assumption which may well be inaccurate. Prisoners are devious and resourceful. It is equally possible, according to the Union, that the inmate came in through the wall or dropped from the ceiling after the room was locked. That may seem far-fetched in ordinary circumstances, but circumstances in a prison are not ordinary, and inmates bent on escape are known to devise extraordinary plans and methods. In other words, the Union contends that Grievant's failure to look under the lab table may have been inconsequential. Moreover, there was little chance that an escape could have been successful from the school building. In view of the Institution's logistics, the prisoner was actually as secure and as far removed from escaping in the locked classroom as he would have been in his locked cell.

In sum, the Union contends Grievant completely performed his responsibilities. Alternatively, it argues that the factors surrounding this case -- the possible negligence of the classroom teach-er, the failure of the Institution to follow its own directives on security, and the lack of any appreciable impact from Grievant's alleged carelessness -- demand at least modification of the penalty. The Union concludes that the just-cause principle protects employees from discharges for trivial, inconsequential neglect, especially employees who have put in long years of service for the Employer.

OPINION

I

Any doubt that Grievant was neglectful was put to rest by one of the Union's own witnesses. A Correction Officer with eighteen years' service was called upon to describe security problems in the school building and define the role of the first-shift officers. He testified cogently and believably. He stated there are fifty-six areas (including closets and lavatories) to be checked by the first-shift security officer, and only a few minutes to complete the task. He noted that there are thousands of places an inmate could hide, and no employee could possibly be certain they were all secure. He also clarified the nature of a teacher's role in the process stating, "It's always a teacher's responsibility upon vacating to check his room and then lock it." But it was on cross-examination that he made the most telling statement. He reluctantly agreed with the Agency's Representative that looking behind the lab table would have been "rudimentary" to any inspection, "shakedown" or otherwise. He stated that he most certainly would have looked there had he been the first-shift security officer.

The conclusion is obvious. Grievant carelessly did less than he was obligated to do and violated a job requirement. Moreover, the violation was <u>not</u> trivial. The Warden testified, without contradiction, that the most important jobs of Correction Officers are key control, tool control, supervision of inmates, and "keeping people here." Grievant breached every one of those responsibilities as well as several others during his career.

II

The Union's contentions that the inmate could not have escaped from the school building and might not even have been there when Grievant locked the door seem to sidestep the issue rather than address it. The fundamental cause for every disciplinary imposition is the act or omission of an employee. Consequences may influence a disciplinary decision, but they can never cause it. The first and most important issue in this dispute is whether or not Grievant violated his responsibilities. The answer is that he did, by failing to inspect under the table. Once that is established, the fact that the inmate could or could not have escaped, or that he might not have been found under the table even if Grievant had looked, is of very little importance if any.

The prisoner did not escape. He was found within a half hour of the count. The impact was demonstrably slight. Still, Grievant was discharged; and the cause was his negligence superimposed on a very poor employment record. The determinant question, therefore, is whether the negligence and the record provided just cause for the penalty.

III

The same reasoning requires the Arbitrator to disregard the allegation that Grievant served as back-up security and, perhaps, a classroom teacher neglected his/her primary security role. It bears repeating that the inmates presence or absence from the classroom at any particular time was not and is not recognized as the cause for discipline. The cause was the Employee's negligence, and the omission was not somehow made less culpable by the fact that others also may have been careless.

IV

Disparate treatment was alleged but not proved by the Union. A universally recognized precept of just cause is that no employee may be singled out for discipline which is harsher than that imposed or likely to be imposed upon others who commit the same offense under the same or similar circumstances. Curiously, one of the best analyses of the principle this Arbitrator has read appears in the Standards of Employee Conduct of the Department of Rehabilitation and Correction. It states:

"The purpose of this policy and procedure is to provide a measure of consistency. The consistency being sought does not require the Employer to administer the discipline indicated in the Standards of Employee Conduct exactly the same in every case. Every distinguishing fact must be considered first.

. . .

The "consistency" that should be sought by the Department of Rehabilitation and Correction should be to strive for a consistently fair and thorough investigation prior to imposing discipline. The Department should also consider the offense being investigated and its relationship to prior disciplinary actions, if they exist. Prior disciplines should receive a two-pronged analysis in asking (1) whether they were of the same or similar nature, and (2) if they were committed in close proximity to each other or did a reasonable amount of time expire in between the offenses. Finally, a consistent application of discipline should take into account other relevant data such as work record or other unique circumstances surrounding the offense."

While the evidentiary burden in a discipline case is initially on the employer, it does not always stay there. It may shift from time to time, especially when the union asserts an affirmative defense. An affirmative defense is one which states that there are factors beyond the ordinary reasons for discipline which ought to be considered. A claim of procedural defects attending discipline is an affirmative defense; failure of due process is another; so is a claim of disparate treatment. When making such claim, the union is obligated to prove its elements.

The Union's presentation in this dispute contained no such proof. It did not establish that Grievant was singled out for discipline which his offense, in view of his employment record and other individual circumstances, did not merit. The fact that others may have escaped discipline or harsh discipline for the same offense is immaterial unless and until the Union proves that their circumstances and records were similar to this Employee's.

V

This brings the discussion to the ultimate question: Was the discharge consistent with just cause? There are many factors which support the Employer's contention that it was. Most importantly, the penalty met the contractual requirement that discipline be progressive. Article 24, §24.02 of the Agreement sets a four-step disciplinary procedure, beginning with verbal reprimands, moving to written reprimands, and then to suspensions. It states that, except in extreme circumstances, discharge is not appropriate until an employee has been given three formal opportunities to improve his/ her conduct or behavior. Moreover, the Agreement sets limits on how long a level of discipline can remain active. Section 24.06 requires verbal and written reprimands to be expunged after twelve discipline-free months, and other forms of discipline to be removed from an employee's record after twenty-four discipline-free months. Grievant had reached the third step in the progressive-discipline continuum, and his carelessness on January 12 was the fourth step. The penalty for the fourth step, one that was mutually agreed upon, was discharge.

VI

The possibility of an award in Grievant's favor still remains. The disciplinary progression in §24.02 is not the whole substance of just cause; it is but one of several factors which make up the standard. In other words, §24.02 does not subsume the principles in §24.01. Just cause is the overriding consideration.

The final question to be answered is this: Is there anything in Grievant's background which can justify arbitral reversal of the Agency's decision? The logical place to look for an answer is the Employee's record of service. It is axiomatic that individuals with long records of quality service are entitled to an extra measure of leniency with respect to discipline.

Grievant has an eight-year employment history but nothing else to recommend leniency. His record demonstrates that repeated attempts of the Agency to remedy his performance deficiencies have gone unheeded, not only in 1988 and 1989, but ever since 1981. His background is not entirely bereft of redeeming possibilities, but it is not sufficiently commendatory to authorize the Arbitrator's intervention into the discharge decision.

The grievance will be denied.

AWARD

The grievance is denied.

Decision Issued:
February 19, 1990

Jonathan Dworkin, Arbitrator