

ARBITRATION DECISION NO.:

264

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Oakwood Forensic Center

DATE OF ARBITRATION:

April 28, 1990

DATE OF DECISION:

June 5, 1990

GRIEVANT:

Dirk Esmonde

OCB GRIEVANCE NO.:

23-12-(88-11-02)-0063-01-03

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Bob J. Rowland

FOR THE EMPLOYER:

Michael P. Duco

KEY WORDS:

Section 13.07

Overtime

Unexcused Absences

Section 29.02

Call Off Policy

ARTICLES:

Article 5 - Management Rights

Article 13 - Work Week,

Schedules, and Overtime

§13.07-Overtime

§13.15-Emergency Leave

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

Article 25 - Grievance

Procedure

§25.03-Arbitration
 Procedures
 §25.04-Arbitration
 Panel
 Article 29 - Sick Leave
 §29.02-Notification

FACTS:

Grievant, a Psychiatric Attendant, is employed by the Ohio Department of Mental Health at the Oakwood Forensic Center. Grievant agreed to work two overtime shifts. The night before the first overtime shift grievant worked until 11:00 p.m. He did not show up for his first overtime shift and did not call-off. Grievant did report for the second overtime shift and explained he slept through the first shift. Grievant was suspended for six days for an unexcused absence.

EMPLOYER'S POSITION:

The employer views Section 13.07 as a general procedure for equalizing overtime; it does not preclude the employer from disciplining the grievant for not reporting or calling off from work. Under 13.07, "An employee who agrees to work overtime and then fails to report for said overtime shall be credited with double the amount of overtime accepted.." The grievant violated Section 29.02 of the Agreement by not notifying the employer and Section 13.07 is not applicable. The grievant has a long history of past discipline. The six day suspension is progressive.

UNION'S POSITION:

The Union believes that under Section 13.07 the grievant should only be charged with double the hours of the first shift overtime. There should be no other penalty. There are mitigating factors: the grievant worked the night before the overtime, the grievant did not have a phone in his residence, and grievant did report to his second overtime shift. Finally, the overtime provisions in Section 13.07 are confusing. The grievant was not aware of the consequences of his improper call off.

ARBITRATOR'S OPINION:

The arbitrator held that Section 13.07 does not preempt the employer's disciplinary rights. Grievant had already received a written reprimand and a two day suspension prior to this incident. Grievant violated Section 29.02. The employer had just cause for the six day suspension.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

**STATE OF OHIO AND OHIO CIVIL SERVICE
 EMPLOYEES ASSOCIATION LABOR
 ARBITRATION PROCEEDING**

IN THE MATTER OF THE
 ARBITRATION BETWEEN

**THE STATE OF OHIO, THE
 OHIO DEPARTMENT OF MENTAL
 HEALTH, OAKWOOD FORENSIC CENTER**

-and-

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

GRIEVANCE:

Dirk Esmonde (6-Day Suspension)

Case No.:

23-12-(881102)-0063-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator:

David M. Pincus

Date:

June 5, 1990

APPEARANCES

For the Employer

Alice Knofla, Nursing Supervisor
Rick Marhorr, Labor Relations Officer
Teri Decker, Labor Relations Officer
Michael P. Duco, Advocate

For the Union

Dirk E. Esmonde, Grievant
David Slone, Chief Steward
Bob J. Rowland, Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Mental Health, Oakwood Forensic Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on April 28, 1990 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

Was, the Six (6)-Day Suspension issued for just cause? If not, what shall the remedy be?

JOINT STIPULATIONS

1. The grievance is properly before the arbitrator.

2. Mr. Esmonde has been employed since 9/4/84 as a Psychiatric Attendant. His normal shift is 3:00 p.m. - 11:00 p.m.
3. Mr. Esmonde knew and was aware of all institutional policies.
4. August 27, 1988, was Mr. Esmonde's normal day off.
5. Mr. Esmonde agreed to work both first and second shift on 8/27/88 for overtime. Mr. Esmonde did not report for the first shift but worked the second shift for overtime pay.

Tim Decker - 3/28/90
Management

Bob J. Rowland
Union

PERTINENT 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 (A) numbers 1-9.

(Joint Exhibit 1, Pg. 7)

ARTICLE 13 - WORK WEEK, SCHEDULES, AND OVERTIME

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Section 13.07 - Overtime

Employees shall be canvassed quarterly as to whether they would like to be called for overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor.

Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Such arrangements shall recognize that in the event the Agency Head or designee has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Agency Head or designee shall have the right to require the least senior employee(s) who normally performs the work to perform said overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Agency agrees to post and maintain overtime rosters which shall be provided to the steward, within a reasonable time, if so requested.

Employees who accept overtime following their regular shift shall be granted a ten (10) minute test period between the shift and the overtime or as soon as operationally possible. In addition, the Employer will make every reasonable effort to furnish a meal to those employees who work four (4) or more hours of mandatory or emergency overtime and cannot be released from their jobs to obtain a meal.

An employee who is offered but refuses an overtime assignment shall be credited on the roster with the amount of overtime refused. An employee who agrees to work overtime and then fails to report for said overtime shall be credited with double the amount of overtime accepted unless extenuating circumstances arose which prevented him/her from reporting. In such cases, the employee will be credited as if he/she had refused the overtime.

An employee who is transferred or promoted to an area with a different overtime roster shall be credited with his/her aggregate overtime hours.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime.

Emergency Overtime. In the event of an emergency as defined in Section 13.15 notwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily meet the emergency requirements, regardless of the overtime distribution.

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(Joint Exhibit 1, Pgs. 20-21)

ARTICLE 24 - DISCIPLINE

Section 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.

Section 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.

(Joint Exhibit 1, Pgs. 34-35)

ARTICLE 29 - SICK LEAVE

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Section 29.02 - Notification

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request that a physician's statement be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off.

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(Joint Exhibit 1, Pgs. 47-48)

CASE HISTORY

Dirk D. Esmonde, the Grievant, has been employed as a Psychiatric Attendant, at the Oakwood Forensic Center, the Employer, since September 4, 1984. At the time of his suspension, the Grievant was working the second shift; the shift commences at 3:00 p.m. and concludes at 11:00 p.m.

The Employer provides services for a population of patients who have been transferred to the facility from

other correctional institutions. Such transfers take place when it has been determined that they are a danger to themselves and others. While in the custody of the Employer, these patients receive care and treatment until it is determined that their condition has been stabilized. Alice Knofla, a Nursing Supervisor, remarked that Psychiatric Attendants play a pivotal role in the patient care provided by the facility. These individuals are part of the nursing department and are integral to the entire system; they provide the direct care. In this capacity they perform the following services: monitor the patients throughout any given shift; take them to meals and activities; and perform security and safety functions.

On Friday, August 26, 1988, the Grievant was asked and volunteered to work overtime on August 27, 1988; his regular day off. The Grievant, more specifically, volunteered to work two overtime shifts on the day in question (Joint Exhibits 6 and 7). He agreed to work the first and second shifts which amounted to a total of sixteen hours of overtime.

On Saturday, August 27, 1988, the Grievant, after working until 11:00 p.m. the previous night, failed to report for his first shift overtime assignment. Knofla testified that the Grievant did not call off within the specified time frame. She noted that he did report and worked his second shift overtime assignment. Upon reporting for work, moreover, the Grievant purportedly exclaimed that he overslept and that he failed to call in because it was too late.

On August 30, 1988, Knofla initiated a Request for Corrective Action (Joint Exhibit 3, pg. 1). As a result of the Grievant's non-appearance for the first shift overtime assignment, she charged him with violating the following institutional policies: Sign-in/Sign-out and Call-in (Joint Exhibit 5 (B)); Overtime (Joint Exhibit 5 (C)); and Employee Absenteeism (Joint Exhibit 5 (D)).

On September 28, 1988, a Pre-disciplinary Conference (Joint Exhibit 3, Pg. 2) was held to review the circumstances surrounding the incident. This review led to the issuance of the following Order of Suspension on October 24, 1988:

“ . . .

This will notify you that you are suspended from duty, without pay, for six (6) consecutive working days from the position of Psychiatric Attendant.

The reason for this action is that you have been found guilty of Neglect of Duty and/or Failure of Good Behavior in the following particulars, to wit: On or about 08/27/88, you were hired to work overtime and you did not call-in and you did not report to work because you "overslept." This is a violation of Oakwood Forensic Center policies dealing with Sign-In/Sign-Out/Call-In, Overtime, Absenteeism and Corrective Action.

You previously received corrective action as follows: 06/26/85 - Verbal Counseling - giving patient sunglasses; 08/18/85 - Oral Counseling - exaggerated ward conditions; 11/26/85 - Two (2) Day Suspensions - Absenteeism; 06/19/86 - Oral Counseling - Tardiness; 08/08/86 - Oral Counseling - Neglect of Duty, Patient Care Issue; 05/15/87 - Written Reprimand - A.W.O.L.; and, 09/10/87 - Two (2) Day Suspensions - A.W.O.L. The Superintendent will notify you of the dates of your suspension.

If you wish to appeal this action, you must file a written grievance with the Agency Director within fourteen (14) days of notification of this action. To file a written grievance, send it to John Rauch, Manager, Labor Relations, Ohio Department of Mental Health, 30 East Broad Street, Suite 1360 A/B, Columbus, Ohio 43215. You may also wish to consult with your union representative.

“ . . .”

(Joint Exhibit 3, Pg. 3)

On November 1, 1988, a grievance was filed contesting the above mentioned Order of Suspension. The grievance contained the following Statement of Facts:

“ . . .

OCSEA/AFSCME grieves management is in violation of preamble Article 13 Section 7 and Article 24 Section

.01 and all other pertinent articles and sections.

OCSEA/AFSCME makes such claim when on 11-1-88, Dirk Esmonde was given a 6 (six) day suspension specifically November 2-3-4-7-8 and 9, 1988.

...”

(Joint Exhibit 2, Pg. 1)

On November 16, 1988, a Step 3 hearing was held by the Parties. The Step 3 Designee determined that the Employer had just cause to suspend the Grievant because he violated a number of institutional policies; the suspension was progressive; and Section 13.07 does not relinquish the right to discipline.

The Parties were unable to resolve the grievance. Since no objection was raised dealing with substantive nor procedural arbitrability, the grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it did have just cause to suspend the Grievant for neglect of duty and failure of good behavior. A number of contract interpretation arguments were offered as well as proofs regarding the violation of several institutional policies.

The Employer maintained that Section 13.07 does not preempt its right from disciplining employees for failing to show up for work after accepting an overtime assignment. The crediting particular contained in this provision was not viewed as conclusive with respect to the rendering of any potential discipline. It is maintained that the credits were negotiated as a potential means to equalize overtime distribution. As such, it does represent a penalty in terms of penalizing employees vis a vis their standing solely on the overtime roster.

The labeling and placement of this provision within the Agreement (Joint Exhibit 1) were referenced in an attempt to bolster the proper intention of the Parties. The questioned provision is labeled "Overtime" and is not nested within Article 24 which deals with "Discipline." Section 24.02, more specifically, provides for progressive discipline, and does not specify the doubling of overtime credits as part of the progressive chain.

The Employer asserted that the Union's preemption interpretation would lead to absurd results. The Employer would never be able to enforce a contracted obligation if an employee was merely penalized in terms of overtime equalization opportunities. As such, an institutional setting requires pre-planned scheduling; and overtime scheduling needs to be treated as a regular shift assignment with the attached responsibilities.

The Grievant's absence on August 27, 1988 was viewed as a violation of a contractual obligation and a series of institutional policies. With respect to the contractual obligation, the Grievant's action was viewed as a direct violation of Section 29.02. This Section requires prior notification when an employee is sick and unable to report for work.

Article 5 - Management Rights, was referenced in support of the Employer's ability to promulgate policies and procedures not relinquished by the Employer nor inconsistent with the Agreement (Joint Exhibit 1). As such, it has promulgated a series of policies dealing with various aspects of employee absenteeism. These include the following policies: Neglect of Duty - Absent Without Leave; Sign-in/Sign-out and Call-in; Overtime; and Employee Absenteeism (Joint Exhibits 5 (A-D)).

The facts clearly indicated that the Grievant's failure to report violated the above-mentioned policies. Knofla noted that the existing overtime practice places volunteers directly on the work schedule, just like other employees that are regularly assigned to that particular shift. As such, even those policies that do not discuss overtime situations were equally violated by the Grievant because he was scheduled for work. These policies included Neglect of Duty - Absent Without Leave (Joint Exhibit 5 (A)); Employee Absenteeism (Joint Exhibits 5 (D)); and Sign-in/Sign-out and Call-in (Joint Exhibit 5 (B)). It was also alleged that the Grievant violated the Overtime Policy (Joint Exhibit 5 (C)) because he failed to observe the call-in procedure.

The Employer asserted that the administered penalty was commensurate with the offense, in line with the

progressive discipline guidelines contained in Section 24.02, and in accordance with the Standard Guide For Disciplinary Action (Joint Exhibit 5 (A)). A great deal of emphasis was placed on the Grievant's Record of Discipline (Joint Exhibit 4). The record, more specifically, indicated that the Grievant experienced a lengthy disciplinary history. The most recent violations dealt with two Absent Without Leave instances. The first violation resulted in a written reprimand while the second led to a two-day suspension.

Mitigation arguments proposed by the Union were refuted by the Employer. The Employer opined that not owning a phone and oversleeping were not valid extenuating or mitigating circumstances.

The Position of the Union

it is the position of the Union that the Employer did not have just cause to suspend the Grievant. Rather, it was asserted that the discipline was levied for punishment instead of corrective reasons.

The Union opined that the Employer misapplied Section 13.07. The Union argued that this provision clearly specifies the nature of the appropriate penalty when an employee fails to report for an overtime assignment after volunteering for duty. As such, the Grievant should have been charged with double the amount of overtime accepted; in this case a total of sixteen hours. Nothing contained in this provision contemplates additional disciplinary penalties. By crediting the Grievant's overtime balance and administering a six-day suspension, the Employer charged the Grievant with an extra penalty.

The Union also opined that some of the policies used to justify the suspension were inaccurately applied. Emphasis was placed on particulars contained in the following policies: Corrective action (Joint Exhibit 5 (A)); Sign-in/Sign-out and Call-in (Joint Exhibit 5 (B)); and Absenteeism (Joint Exhibit 5 (D)). None of these policies referenced overtime applications and should not have been applied in the rendering of the present discipline.

Several mitigating circumstances were introduced in an attempt to underscore the excessive nature of the administered penalty. First, even though the Grievant failed to report to his first overtime assignment, he did in fact report in a timely manner for his second assignment. Second, the Grievant did not have a phone at his residence which prevented his timely response. Third, the Grievant worked his own shift prior to the incident in question which caused him to oversleep. Fourth, the Overtime policy (Joint Exhibit 5 (C)) cites provisions outside of the Agreement (Joint Exhibit 1) negotiated by the Parties; sections other than Section 13.07 are referenced in this document. As such, the Grievant and other bargaining unit members could have easily been confused the specific application of Section 13.07.

THE ARBITRATOR'S OPINION AND AWARD

Based upon the evidence and testimony introduced at the hearing, it is my judgment that the Employer had just cause to suspend the Grievant for six days. The Employer did apply the relevant contract provisions accurately and the penalty was commensurate with the offense.

In the opinion of this Arbitrator, the Section 13.07 language dealing with overtime credits does not preclude the application of other relevant disciplinary policies when an employee fails to fulfill an overtime obligation and (Arbitrator's emphasis) engages in collateral misconduct. This Section merely deals with general overtime guidelines and the mechanism to be used to equalize overtime opportunities in an equitable fashion. Equity concerns, however, not only impact bargaining unit member relationships, but also the responsibilities that members have to the Employer. Obviously, the accrual of overtime credits does penalize an employee by foreclosing future overtime opportunities. Such a penalty, standing alone, would not address situations where an employee's blatant disregard for necessary call-in requirements would jeopardize the services offered in this type of institutional setting.

This Section does not contemplate any preemption of the Employer's disciplinary rights. The language fails to support such a premise. If the Parties had contemplated such a specific exception, they would have negotiated language negating the impact of Article 24 and would have included such a reference in Section 13.07. Also, an interpretation in the Union's favor would force this Arbitrator to limit the Employer's management rights in terms of its ability to promulgate policies and practices which are not inconsistent with

the Agreement (Joint Exhibit 1). Such rights and authorities are provided for in Article 5. The various absenteeism related policies (Joint Exhibits 5 (A) - (D)) applied by the Employer in this instance are properly promulgated and enforceable. They are not inconsistent with the Agreement (Joint Exhibit 4).

These policies are not only enforceable but were applied properly with respect to the present matter. Once the Grievant volunteered to work overtime he acquired regularly scheduled status and all of the related responsibilities contained in the above mentioned policies. The practice engaged in by the Employer supports this view. The Grievant's work schedule (Joint Exhibit 7) clearly indicates that the Grievant was scheduled to work on the first shift but failed to show or call the facility in a timely fashion. Knofla, moreover, noted that if the Grievant had called in at least one hour in advance of his scheduled starting time, a specific requirement contained in the Call-in Policy (Joint Exhibit 5 (B)), he would have been treated as if he had canceled his overtime obligation. No other penalty would have been attached other than the normal overtime credit.

The record supports the various violations proposed by the Employer. The Grievant, in accordance with the Overtime Policy (Joint Exhibit 5 (C)), failed to observe the call-in procedure. This procedure (Joint Exhibit 5 (B)) requires an employee to call in at least one hour in advance of the scheduled starting time. The Grievant failed to notify the Employer in advance and never called even though he overslept. Such a total disregard for common courtesy cannot be condoned by this Arbitrator. His misconduct, moreover, violated Employee Absenteeism policies (Employer Exhibits (A) and (D)). He failed to report to work at the scheduled starting time.

The penalty was commensurate with the offense and in light of the Grievant's prior work history. As such, it was properly progressive since the Grievant received a reprimand and two-day suspension prior to the present altercation (Employer Exhibit 7).

The various allowances suggested by the Union are not viewed as persuasive mitigating factors. If anything, they are viewed as aggravating circumstances. His prior record of service, sleepy state, and lack of phone service support rather than rebut the propriety of the assessed penalty. This Arbitrator is unwilling to modify a penalty that is within the range of reasonableness anticipated by the Employer and supported by the undisputed facts in the record.

AWARD

The grievance is denied.

David M. Pincus
Arbitrator

June 5, 1990