

OCB Award No: 23

OCB Grievance No: G 86-0580

Union: OCSEA / AFSCME

Department: Rehabilitation & Corrections

Arbitrator: Pincus, David

Award Date: 8/3/74

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES' ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTIONS,
Ohio State Reformatory (Mansfield, Ohio)

-and-

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

GRIEVANCE: Samuel Ware (Discharge)

CASE NUMBER: G-86-0580

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus

Date: March 4, 1987

APPEARANCES

For the Union

Samuel Ware	Grievant
Risa Lazaroff	Observer
Brenda Butcher	Observer
Daniel S. Smith	General Counsel OCSEA
John Porter	Counsel OCSEA

For the Employer

Wallace Croskey	Personnel Director
Shirley Turrell	Observer
Nick G. Menedis	Chief of Labor Relations

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04, entitled Arbitration Procedures and Arbitration Panel of the Agreement between The State of Ohio, Ohio Department of Rehabilitation and Correction, Ohio State

Reformatory (Mansfield, Ohio), 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 February 2, 1987 at the office of the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO. 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.

ISSUE

Did the Employer have just cause to discharge the Grievant?

PERTINENT CONTRACT PROVISIONS

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." (Joint Exhibit 1, pages 34-35)

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 provision 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, page 35)

* * * *

Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

"The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

"If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

"The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary 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." (Joint Exhibit 1, pages 36-37).

Section 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." (Joint Exhibit 1, page 37)

ARTICLE 29 - SICK LEAVE

* * * *

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." (Joint Exhibit 1, pages 47-48)

ARTICLE 36 - WAGES

* * * *

Section 36.05 - Roll Call Pay

"Correction Officers in the Department of Rehabilitation and Corrections shall be entitled to thirty (30) minutes of roll call pay for reporting prior to the beginning of their shift. Current practice on reporting time shall continue unless mutually agreed otherwise." (Joint Exhibit 1, page 58)

ARTICLE 43 - DURATION

* * * *

Section 43.03 - Work Rules

"After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement." (Employer Exhibit 1, page 62)

CASE HISTORY

The Ohio State Reformatory is located in Mansfield, Ohio. The facility is a four (4) shift operation, houses twenty-eight hundred (2800) inmates, and employs two-hundred-seventy (270) corrections officers. Samuel Ware, the Grievant, has been employed at the facility as a corrections officer since October 31, 1983.

The Grievant was suspended a number of times prior to the incident which eventually led to his discharge or removal. It should be noted that the following actions all dealt with various charges dealing with neglect of duty.

The first action took place on January 22, 1984. The Grievant was suspended for three (3) days because his supervisor observed the Grievant sleeping on the job. The Employer concluded that such inattentiveness constituted neglect of duty. (Employer Exhibit 1A)

The second action took place on October 19, 1984 and dealt with a similar set of circumstances. Specifically, the Grievant was observed sleeping on the job by his supervisor. The Grievant's inattentive state was viewed by the Employer as neglect of duty, and as a consequence the Employer issued a five (5) day suspension. (Employer Exhibit 1B)

The third action dealt with a number of violations and was issued on December 7, 1984. Once again the Grievant was observed sleeping at his assigned work station. In addition, the Grievant was disciplined for failing to report for duty on time and neglecting to notify the institution of his lateness for duty. These activities resulted in the issuance of a ten (10) day suspension. (Employer Exhibit 1C)

The fourth action was implemented on October 18, 1985 and also dealt with multiple violations. The Grievant was reprimanded for being absent from his assigned duty without leave. Specifically, the Grievant had experienced ten (10) unauthorized absences for the period May 12, 1985 to October 4, 1985.

The Grievant, moreover, was disciplined for knowingly permitting inmates assigned to Local Control status to read contraband material. For the above-mentioned particulars, the Grievant was suspended for fifteen (15) working days. (Employer Exhibit 1D).

The above actions had a number of similar characteristics. They were issued prior to the effective date of the Collective Bargaining Agreement (Joint Exhibit 1) negotiated by the parties. These actions also contained a warning indicating that future neglect of duty would result in disciplinary action up to and including potential removal of the Grievant from his position. Finally, all of these suspensions were reviewed by the State Personnel Board and were upheld in the Employer's favor.

The Grievant did not experience any additional disciplinary problems for approximately ten (10) months subsequent to the October 18, 1985 suspension (Employer Exhibit 1D). On or about August 25, 1986, the Grievant testified that he contacted his supervisor requesting emergency leave for Saturday, August 30, 1986, and Sunday, August 31, 1986. It should be noted that Thursday and Friday were the Grievant's normally scheduled off days. The Grievant alleged that this leave was necessary because his father-in-law, who lived in New York, was experiencing a series of life threatening medical maladies. The supervisor purportedly approved the leave request, but asked the Grievant to provide documentation when he returned to work.

A few days following the above discussion, the Grievant allegedly received information which indicated that his father-in-law's condition had stabilized. As a consequence, he contacted his supervisor and asked to be scheduled for work on August 30, 1986.

On the morning of August 30, 1986 the Grievant claimed that a number of circumstances caused him to be tardy for work. The Grievant testified that he possessed two (2) uniforms and that he had forgotten that they were at the

cleaners. He noted that his mother had agreed to pick them up while he was out of town. The Grievant maintained that his travel plan modification caused this unique logistical circumstance. The Grievant, moreover, testified that he attempted to compensate for this problem by proceeding to clean and repair an old uniform.

The Grievant testified that he became aware of the problem at approximately 5:25 a.m. He also noted that he lost track of the time while attempting to put a uniform together; and that he eventually called the facility at 5:50 a.m. explaining that he would be tardy. It should be noted that the Grievant eventually reported for work at 7:10 a.m. This caused him to be approximately one (1) hour and ten (10) minutes late for work.

As a result of the above tardiness, and the Grievant's previous disciplinary record, the Employer initiated a disciplinary investigation. On September 17, 1986, an Administrative Hearing Officer issued the following Disciplinary Summary/Recommendation Sheet:

"CHARGED RULE(S) VIOLATION: Failure to Follow Policy: Unauthorized Absence

FINDING OF FACT:

There exists substantial evidence in that C/O Ware admits that he failed to call off in a timely manner on 8-30-86. In addition, C/O Ware admits that he was 70 minutes late in reporting to work on 8-30-86.

As a defense, C/O Ware states that he had forgotten to pick up his uniform from the cleaners because he was upset over an illness in his family. On the morning of 8-30-86 while preparing to go to work, he alleges that he realized that he had no clean uniform so he proceeded to clean and repair an old uniform. He did call off that he would be late, but the call was never received at the start of the shift and, therefore, not timely as per policy. As the uniform situation was under his control and not an emergency, his supervisor did not authorize vacation leave for the 70 minutes.

The total penalty points for the present misconduct is eight (8). It should be noted that C/O Ware has received suspensions of three, five, ten & fifteen days in the last 30 months.

MITIGATING FACTORS: N/A

PREVIOUS RULE VIOLATIONS:

<u>DATE</u>	<u>RULE</u>	<u>PENALTY POINTS</u>
10-18-85	1a (10 counts)	30
10-18-85	3b	0
10-31-84	5	5
10-31-84	1a	0
10-19-84	5	5
01-22-84	5	5

ACCUMULATIVE TOTAL PENALTY POINTS: 53

BASED ON THE ACCUMULATIVE TOTAL OF PENALTY POINTS, THE FOLLOWING PENALTY IS SUGGESTED: Removal

(Signed) _____ 09-17-86 "
ADMINISTRATIVE HEARING OFFICER DATE
(Employer Exhibit 1E)

It should be noted that the Appointing Authority concurred with the above recommendation, and he also recommended that the Grievant should be removed.
(Employer Exhibit 1E)

Richard P. Seiler, the Appointing Authority, and Eric G. Dahlberg, the Superintendent, issued the following Order of Removal on September 19, 1986:

"Mr. Samuel E. Ware:

"This will notify you that you are terminated from the position of Correction Officer 2 effective September 29, 1986.

"The reason for this action is that you have been guilty of **NEGLECT OF DUTY** in the following particulars, to wit: On August 30, 1986 you failed to call off absent in a timely manner. In addition, you were seventy (70) minutes late in reporting to work and this absence was not authorized. It is also noted that on October 18, 1985 you received a fifteen (15) day suspension for ten (10) separate instances of unauthorized absences. On January 22, 1984 you received a three (3) day suspension for sleeping on duty, on December 7, 1984 you received a ten (10) day suspension for sleeping on duty. Based on the principles of progressive discipline, your continued violation of regulation and policies even after receiving suspensions of 3, 5, 10 & 15 days. Leaves me no alternative but to remove you from your position as a Correction Officer II.

"Signed at MANSFIELD/COLUMBUS, Ohio September 19, 1986

"Section 124.34 of the Revised Code, and instruction to the employee, are on the reverse side of this form.

(signed Richard P. Seiter)
Actual Signature of Appointing Authority

Richard P. Seiter, Director
Type Name and Title of Appointing Authority

(signed)
Eric G. Dahlberg,
Superintendent Ohio State Reformatory

Department of Rehabilitation & Correction"

(Employer Exhibit 1F)

On September 29, 1986, the Grievant filed the following protest in response to the above Removal Order:

"STATEMENT OF GRIEVANCE:

List applicable violation: 24.02, 24.05 I hereby grieve my removal from Ohio State Reformatory on 9-29-86. This is not Progressive Discipline per AFSCME contract. I did not deserve any discipline.

Adjustment Required: I require that I be re-instated (sic) to OSR immediately with back pay and made whole." (Joint Exhibit 2)

The parties were unable to resolve the dispute at the various stages of the grievance procedure. (Joint Exhibit 2)

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 had just cause to discharge the Grievant. The Employer emphasized that the Grievant's behavior on August 30, 1986, served as the triggering mechanism for the Removal Order; but that the actual removal was based on the totality of the Grievant's accumulated discipline record. (Employer Exhibit 1)

The Employer argued that it properly exercised its management prerogative by disciplining the Grievant for failure to call off in a timely manner, reporting late for work in an unauthorized manner, and his accumulated discipline record (Employer Exhibit 1). The Employer claimed that the Grievant's removal was based on the rights specified in the Management Rights

Article (Joint Exhibit 1, page 7), and other rights listed in Ohio Revised Code Section 4117.8 (c) (5).

The Employer argued that the Grievant's previous disciplinary record was abhorrent and justified his dismissal. The Employer made specific mention of several suspensions which took place in 1984 and 1985. Three (3) of the suspensions took place in 1984 and they all dealt with the Grievant sleeping on the job (Employer Exhibits 1 A-C). It should be noted that the December 7, 1984, suspension also indicated that on November 12, 1984, the Grievant failed to report for duty on time, and also failed to notify the facility of his lateness for duty (Employer Exhibit 1). The Employer maintained that the escalation of the penalties attached to these suspensions indicated that they were following progressive discipline principles.

The Employer claimed that the previously mentioned suspensions failed to produce the expected modification of the Grievant's behavior. The Employer noted that the Grievant was again suspended for fifteen (15) days on October 18, 1985. This action was initiated because of a series of unauthorized absences. In addition, the Grievant was reprimanded because inmates in Local Control were found in possession of contraband reading material. (Employer Exhibit 1-D)

Wallace Croskey, the Personnel Director, testified that these offenses were reviewed, and considered, prior to the issuance of the Removal Order (Employer Exhibit 1-F). He also maintained that all of these suspensions were originally appealed by the Grievant, and that the State Personnel Board of Review upheld the Employer's actions. Croskey contended, moreover, that the Employer had a right to consider these prior disciplinary actions even though they were issued prior to the effective date of the Agreement (Joint Exhibit 1). In support of this claim, he pointed to an existing section in the Agreement which was mutually negotiated by the parties (See page 3 of this

Award for Article 24 - Discipline, Section 24.06 - Prior Disciplinary Actions), and provided the Employer with this opportunity.

The Employer argued that Article 43, Section 43.03 (See page 4 of this Award for Article 43 - Duration, Section 43.03 - Work Rules) entitles the Employer to develop work rules, and that the promulgation of the facility's tardiness policy was an expression of this right. Croskey provided testimony concerning tardiness policy regulations, and the types of actions engaged in by the Employer if employees failed to abide by these requirements.

Croskey claimed that prior to the effective date of the Agreement (Joint Exhibit 1), the Employer based its tardiness policy on the following statement contained in the Employer's Sick Leave Policy:

"All employees unable to report for duty at their scheduled time because of illness must notify the Control Room (419-526-2000) of that fact at least one hour prior to their scheduled starting time. Control will then notify the Personnel Office and the employee's supervisor, on the forms provided." (Employer Exhibit 4)

Croskey also maintained that a similar notification requirement was incorporated into the Agreement (See page 4 of this Award for Article 29 - Sick Leave, Section 29.02 - Notification). Since the facility required advance notice because of staffing requirements, the policy required all officers to call at least one (1) hour prior to the start of the shift.

Another aspect of the tardiness policy dealt with roll call time. Croskey testified that there was no difference between roll call and starting time. He noted that the first shift always started at 5:50 a.m. and that the officers were required to appear at that point in time. The Employer claimed that Croskey's contentions were supported by the Roll Call Pay section in the Agreement (See page 4 of this Award for Article 36 - Wages, Section 36.05 - Roll Call Pay). This section allegedly entitles corrections officers thirty (30) minutes of overtime pay for reporting ten (10) minutes prior to the beginning of the shift.

Croskey maintained that the tardiness system operated in the following manner. First, employees were required to call in and provide the facility with a reason for his/her inability to report for duty. This call would be documented by an officer at the facility. Second, the employee would typically attempt to recoup any lost pay by submitting a Request For Leave form. Third, the request would be reviewed by a supervisor in terms of propriety and would either be approved or disapproved. Last, if the request was disapproved, the employee's pay would be docked. Croskey also mentioned that repeated violations resulted in other forms of discipline.

The Employer provided a series of 1985 call in slips and Request For Leave forms in an attempt to bolster its totality of conduct argument (Employer Exhibit 2). These documents allegedly evidenced the Grievant's tardiness propensity on twelve (12) separate occasions. It should be noted that both call in slips and Request For Leave forms were provided for some of the dates, while other incidents were documented with individual documents. Croskey also testified that the Employer approved some of these tardiness incidents.

Further evidence of the Grievant's behavioral pattern was provided by Croskey's review of the Grievant's 1986 time keeping records (Employer Exhibit 4). Croskey noted that the Grievant was tardy nine (9) times for the period April 1, 1986 to August 15, 1986. Croskey claimed that the Grievant did not have these tardiness incidents approved because his pay had been docked.

Croskey alleged that other instances of similar misconduct were engaged in by the Grievant but that the Employer had not initiated any disciplinary action. Croskey testified that the Employer counseled the Grievant regarding his tardiness behavior. He also noted that some of the supervisors failed to initiate any disciplinary action because they were aware that any additional impropriety by the Grievant could result in discharge. In the Employer's opinion, the August 30, 1986 incident was the "last straw" and it could no

longer condone the Grievant's most recent and previous infractions.

The Employer argued that the Grievant understood the need for prior notice and was properly notified about the procedure that needed to be followed when he was tardy. Croskey testified that the Sick Leave Policy (Employer Exhibit 4) was attached to all employees' pay checks, and that it was announced by the supervisors at the line-ups. The Employer also emphasized that the Grievant received similar notification during his orientation program, and should have been familiar with the process as a result of normal facility procedure. The Employer contended that the Grievant, via his testimony, acknowledged that he received some notification concerning the process.

The Employer emphasized that the Grievant's behavior jeopardized its ability to run an efficient facility. Croskey testified that tardiness engendered excessive overtime, and placed a heavy burden in the facility's operational requirements.

The Employer argued that the suspensions issued by the Employer prior to the effective date of the Agreement (Joint Exhibit 1), under Section 124.34 of the Civil Service law (Employer Exhibit 1), were reviewed by the State Personnel Board of Review with just cause principles in mind. In support of this argument, Croskey testified that the Union often argued these principles in front of the State Personnel Board of Review.

The Employer argued that the Union proffered no evidence to substantiate its claim that the Employer violated Article 24, Sections 24.02 and 24.05 (See pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.04 - Progressive Discipline, Section 24.05 - Imposition of Discipline). Moreover, the Employer claimed that it had sustained its burden by a preponderance of the evidence, and that it had met all of its just cause responsibilities.

The Employer emphasized that the Arbitrator should uphold the removal and refrain from substituting his judgment for that of the Employer. In support of

this argument, the Employer referenced the limitations contained in the Agreement which limited an arbitrator's scope and authority (Joint Exhibit 1, page 40), and the section dealing with past practices (See page 4 of this Award for Article 43 - Duration, Section 43.03 - Work Rules).

The Position of the Union

It is the position of the Union that the Employer did not have just cause to discharge the Grievant. The Union argued that the Employer's ability to discipline employees was not unfettered, and that the Employer's removal decision was defective for a number of reasons.

First, the Union argued that the removal action violated just cause principles because it was unreasonable. The Union maintained that the Removal Order (Employer Exhibit 1A) cited one (1) incident of tardiness. The Union emphasized, moreover, that the action taken by the Employer was excessive since the Grievant's record had been void of any violation since his October 18, 1985 suspension (Employer Exhibit 1D). The Union argued that the removal was especially onerous because the Grievant had not been disciplined for a tardiness violation for approximately eleven (11) months.

Second, the Union argued that some of the evidence introduced by the Employer, in its attempt to establish a behavioral pattern, should be discounted because it lacked relevance. The Union noted that the call in slips and Request For Leave forms predated the October 18, 1985 suspension (Employer Exhibit 1D), and did not reflect recent violations. In a similar fashion, the Union alleged that the time keeping records (Employer Exhibit 3) discussed by Croskey were not the best evidence, and therefore, were deficient in terms of evidentiary import. The Union claimed that the call in slips and Request For Leave forms were available, but were not introduced by the Employer.

Third, the Union also charged that the Employer applied its tardiness policy inconsistently, and, as a consequence, denied the Grievant proper

notice. The Union maintained that if the Grievant was tardy on numerous other occasions, then the Employer had the responsibility of disciplining the Grievant at the time of the violations. The Union maintained that the Employer's failure to provide proper notice confused the Grievant because of the dual messages communicated by the Employer. The Union claimed that Croskey's testimony regarding the contents of the Removal Order (Employer Exhibit 1F) supported the inconsistency hypothesis. Under cross-examination Croskey acknowledged that the Removal Order (Employer Exhibit 1F) did not contain the tardiness incidents that he had previously alluded to. The Union contended, moreover, that Croskey stated that removal orders normally reflect all instances of misbehavior. Yet, he could not substantiate why other instances of tardiness were considered, but not included, in the Removal Order (Employer Exhibit 1F).

In a similar fashion, the Union claimed that Croskey's statements concerning the counseling received by the Grievant prior to the removal lacked credibility. The Union noted that under cross-examination Croskey could not document an institutional policy dealing with counseling. The Union, contended, moreover, that Croskey could not document the dates of the counseling sessions and their frequency. The Grievant's testimony also partially contradicted Croskey's assertions. Specifically, he claimed that tardiness instances, which allegedly occurred after October 18, 1986, were never mentioned at any pre-disciplinary conferences.

Fourth, the Union also challenged the Employer's application of a Sick Leave Policy (Employer Exhibit 4, See page 4 of this Award for Article 29 - Sick Leave, Section 29.02 - Notification) to tardiness situations. The Union claimed that neither the pre-Agreement policy (Employer Exhibit 4), nor the provision negotiated by the parties (See page 4 of this Award for Article 29 - Sick Leave, Section 29.02 - Notification), made any reference to tardiness.

The Union noted that the Grievant was not ill, and therefore, the Sick Leave Policy (See page 4 of this Award for Article 29 - Sick Leave, Section 29.02 - Notification) should not have been applied to the present situation. The Union maintained that the Grievant had previously been informed about notification requirements, but that sick leave and other types of absences were discussed without any mention of tardiness. The one (1) hour call in requirement discussed by the Employer also seemed unreasonable in tardiness situations. More specifically, the Union claimed that it would be highly unlikely for an employee to predict his/her tardiness one (1) hour in advance of the starting time.

Fifth, the Union suggested that the removal should be rescinded because the Employer violated the Progressive Discipline section contained in the Agreement (See pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.02 -Progressive Discipline). The Union claimed that the Removal Order (Employer Exhibit 1F) was not commensurate with the offense. It emphasized that the Grievant's prior disciplinary record primarily concerned non-tardiness incidents. Also, the Union contended that even if the Employer had a bona fide tardiness policy, the policy never defined what constituted excessive tardiness.

Sixth, the Union argued that the Grievant's prior suspensions (Employer Exhibits 1A-D) were issued without just cause considerations. Specifically, the Union claimed that prior to the Agreement (Joint Exhibit 1) disciplinary proceedings utilized Section 124.34 of the Civil Service law (Employer Exhibit 1) as the statutory basis for removal. Since the statutory requirements contained in the above mentioned section did not include a just cause standard, the Union suggested that minimal emphasis should be placed on the previous reprimands.

Last, the Union proposed a number of mitigating circumstances in an attempt to counter the Employer's removal decision. The Union maintained that the Grievant provided a reasonable excuse for his tardiness on August 30, 1986. Specifically, his father-in-law's precarious medical condition, and his consequent uniform difficulties, warranted a penalty other than discharge. The Union also stressed that the Grievant modified his behavior after the October 18, 1986 suspension (Employer Exhibit 1). More specifically, the Grievant did not engage in any activities which led to formal discipline for approximately ten (10) months. The Grievant testified that he changed shifts and worked overtime in an attempt to redress his previous disciplinary problems.

For the above mentioned reasons, the Union argued that the Employer failed to support its just cause responsibilities.

THE OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is the opinion of this Arbitrator that the Employer did not have just cause to discharge the Grievant.

It is a well established arbitral principle that an employee cannot be penalized by discharge, or by any other lesser penalty, merely for the employee's past record, unless the employee has committed a present offense (Revere Copper and Brass, Inc., 45 la 254, McCoy, 1965; Owens-Illinois, Inc. 74 la 994, Koven, 1981; Turco Mfg. Co., 74 la 889, Penfield, 1980). Put another way, the final act must serve as a "justifiable trigger" for some discipline. Without the existence of such a factor, an employee's previous work record, and past attempts at progressive discipline, become meaningless (Overhead Door Co., 70 la 1299, Dworkin, 1978).

In this Arbitrator's opinion, the Employer's tardiness policy was too ambiguous to justify the conclusion that the Grievant was clearly informed

Unfortunately, the Employer failed to introduce call in slips and/or Request for Leave forms to clarify the 1986 record keeping data (Employer Exhibit 3). A submission of these documents could have provided a sufficient basis for the Employer's consistency argument.

The ambiguity surrounding the call in requirement criterion was further confused by the contents contained in the Disciplinary Summary/Recommendation Sheet (Employer Exhibit 1E). The following statement was provided in the Finding of Fact:

"He did call off that he could be late but the call was never received at the start of the shift and, therefore, not timely as per policy."

This statement conflicts with testimony provided by the Employer that the Grievant should have called in one (1) hour prior to the shift. This ambiguity might have been eliminated if the management representative conducting the pre-disciplinary hearing had been present at the arbitration hearing. Croskey's testimony, moreover, surrounding the rationale for the removal was a bit limited. He stated that he was on vacation and was not totally involved in the disciplinary process.

The Employer, of course, has the right to establish reasonable work rules dealing with tardiness (See page 4 of this Award for Article 43 - Duration, Section 43.03 - Work Rules). The consequences, however, of failure to meet the conditions contained in these rules must be spelled out to the employees. In this Arbitrator's opinion, the Employer's failure to make these consequences clear to the Grievant also negated its ability to discharge the Grievant.

Testimony provided at the hearing indicated that employees were either docked in terms of lost pay, or their justifications were approved via the application of leave benefits. Documents submitted by the Employer indicated that compensatory time was typically used in these situations (Employer Exhibit 2). The Employer failed to provide this Arbitrator with sufficient evidence

that the Grievant, or any other employee, could have expected that other forms of disciplinary action would be levied by the Employer. More specifically, the Employer did not provide this Arbitrator with any evidence that other employees had been disciplined under its tardiness policy.

Although the Management Rights Article (Joint Exhibit 1, Page 7), and the Progressive Discipline section (See pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline) provide for an escalation of disciplinary penalties, the lax enforcement of the tardiness policy established a form of "negative notice" that such misconduct was acceptable. Documents provided at the hearing clearly indicated that the Employer condoned this type of tardiness behavior for approximately two (2) years (Employer Exhibits 2 and 3). In fact, Croskey testified that supervisors intentionally neglected to reprimand the Grievant for tardiness behavior because they knew that an additional disciplinary action would result in his removal. The Employer's contention that it had placed the Grievant on notice concerning his abhorrent tardiness behavior, in counseling sessions, was also insufficiently supported. The Employer failed to provide documents or credible testimony to support this argument. The fact that the Employer condoned the tardiness behavior is further supported by the contents contained in the Removal Order (Employer Exhibit 1F). Specifically, this document does not mention the tardiness behavior engaged in by the Grievant over the past two (2) years.

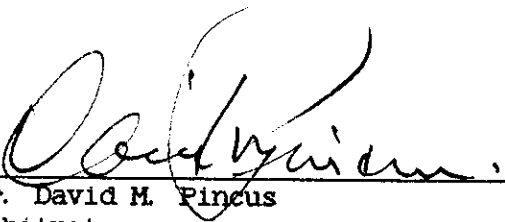
Although the discharge is being erased from the Grievant's record, it should not be inferred that this Arbitrator condones the Grievant's many offenses. The decision would not have been the same if the Employer's tardiness policy had been more lucid, and if the Employer had properly communicated its expectations to the Grievant. It should be obvious that all this Award accomplishes is to return the Grievant to the point that he was at under the progressive disciplinary system immediately prior to the discharge.

AWARD

The discharge of the Grievant was not for just cause. The Employer is ordered to reimburse the Grievant for any lost wages and all other benefits he would have received from the time of his discharge to the time of his reinstatement. The Employer is also directed to reinstate the Grievant to his position with full seniority forthwith.

Except as hereinabove amended, the Grievant's record of discipline is to remain intact.

March 4, 1987



Dr. David M. Pincus
Arbitrator