

**VOLUNTARY LABOR ARBITRATOR**

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

**STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION  
AND DEVELOPMENTAL DISABILITIES**

**AND**

**STATE COUNCIL OF PROFESSIONAL EDUCATORS/OHIO EDUCATION  
ASSOCIATION/NATIONAL EDUCATION ASSOCIATION**

**(Grievance of Barbara Edwards)  
(Office of Collective Bargaining Grievance No. G86-0573)**

**DECISION AND AWARD OF THE ARBITRATOR**

**Arbitrator:**

**RICHARD H. SIEGEL, ESQ.  
Suite 700  
Three Commerce Park Square  
23200 Chagrin Boulevard  
Cleveland, Ohio 44122  
(216) 831-3282**

I.

PROCEDURAL STATEMENT

The subject matter of this proceeding was submitted to the Arbitrator pursuant to the grievance-arbitration provisions (Articles 5 and 6) of the Labor Agreement between the STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES ("Employer") and the STATE COUNCIL OF PROFESSIONAL EDUCATORS/OHIO EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION ("Association"):

ARTICLE 5 - GRIEVANCE PROCEDURE

5.02 - Definitions

(B) Disciplinary Grievance - refers to a grievance involving a suspension,...

\* \* \* \* \*

5.05 - Grievance Procedure

(F) Request for Arbitration - If the Association is not satisfied with the answer at Step 4, it may submit the grievance to arbitration under the provisions of Article 6, by filing a written notice with the Director of the Office of Collective Bargaining and a copy to the employing agency Director within fifteen (15) days after receipt of the decision in Step 4.

ARTICLE 6 - ARBITRATION

6.04 - Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of the provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify

any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

6.07. - Arbitration Decisions

\* \* \* \* \*

The arbitrator's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issues submitted to arbitration. The arbitrator's decision shall be final and binding upon the Employer, the Association and the employee(s) involved, except as provided in Chapter 2711 of the Ohio Revised Code.

On October 24, 1986, the Association filed a timely amended grievance on behalf of bargaining unit employee Barbara J. Edwards ("grievant") protesting the Employer's imposition of a twenty (20) day suspension against the grievant effective November 12, 1986. The grievance alleged that the grievant was suspended without just cause and "without verbal or written reprimand". The Association requested that the grievant be granted "the return of any lost benefits (wages, leaves, etc.) surrounding this incident, and the removal of any information surrounding this incident from (her) file".

The Employer rejected the grievance at all steps of the grievance procedure and took the position that the grievant's twenty (20) day suspension was for just cause and that she "had been guilty of client abuse (neglect), insubordination, failure of good behavior and neglect of duty" based upon four (4) incidents documented by the Employer.

The grievance was submitted to binding arbitration and an evidentiary hearing was conducted in Cleveland, Ohio, on April 6, 1987. During the course of this evidentiary hearing, the parties waived all procedural objections and presented testimony, narrative statements, stipulations and exhibits in support of their respective positions. Upon each party having fully presented its case to the Arbitrator, including the submission of post-hearing briefs on or before April 27, 1987, the hearing in this proceeding was declared closed on that date and the Arbitrator was authorized to submit his Decision and Award on or before May 27, 1987.

## II.

### FINDINGS OF FACT

The testimony, exhibits and narrative statements presented by the Employer and the Association revealed significant disagreement and contradictions as to the facts which resulted in the Employer's decision to impose a twenty (20) day suspension against the grievant effective November 12, 1986. For this reason, the Arbitrator has made his own determination as to the weight and credibility of such evidence. What follows are the Arbitrator's findings as to those facts which are clearly supported by the evidence and determinative of the issues in this case.

The Employer employed the grievant as a full-time vocational teacher of the mentally retarded at the Warrensville, Ohio, Developmental Center of the Ohio Department of Mental Retardation and Developmental Disabilities. This facility is an intermediate care institution caring for approximately 237 residents in a 261 bed institutional environment.

In the three (3) months preceding the grievant's twenty (20) day suspension, she was the subject of Employer discipline for the following incidents:

(A) On July 21, 1986, the grievant's inattentiveness permitted an institutional resident for whom she was responsible to rummage through garbage, devour cigarette butts and go to the restroom unattended.

(B) On July 30, 1986, the grievant left work in the middle of her shift without the approval of her supervisor and in violation of Employer policy.

(C) On September 2, 1986, the grievant was observed in her classroom performing instructional services in a manner contrary to Employer policy and in disregard of classroom curriculum established by the Employer.

(D) On September 25, 1986, the grievant was observed smoking cigarettes in her classroom in the presence of her students and in disregard of Employer policy.

The grievant was given no written or oral reprimands after the occurrence of any of these incidents.

The Arbitrator finds on the basis of clear and con-

vincing evidence that each of these four (4) offenses was in violation of Employer policy and instructions which were either previously made known to the grievant or which in the exercise of reasonable diligence and common sense she should have known to be violative of Employer policy and subject to discipline.

On October 24, 1986, the Employer utilized Chapter 4117 of the Ohio Revised Code (Ohio Civil Service statutes) to merge these four (4) offenses into a single disciplinary action in which the grievant was suspended for twenty (20) working days "the reason for this action (being) that you have been guilty of client abuse (neglect), insubordination, failure of good behavior and neglect of duty".

The Arbitrator finds further that at the time of these four (4) occurrences, the Employer maintained written work rules governing the bargaining unit and that these work rules had not been provided to the Association in accordance with Article 14 (Section 14.01) of the Labor Agreement:

The Association will be furnished with a copy of the work rules in advance of their effective date. . . . Work rules shall be made available to affected employees prior to their effective date.

During the period of time pertinent to these events, Article 3, Section 3.01 of the Labor Agreement contained the following managerial rights provision:

The sole and exclusive rights and authority of management include . . . the following:  
(5) Suspend . . . for just cause.

On the basis of these findings of fact and the applicable provisions of the Labor Agreement, this matter is before the Arbitrator for adjudication.

III.

ISSUES TO BE DETERMINED BY THE ARBITRATOR

(A) WAS THE GRIEVANT'S TWENTY (20) DAY SUSPENSION FOR  
JUST CAUSE PURSUANT TO ARTICLE 3, SECTION 3.01  
OF THE LABOR AGREEMENT?

D E C I S I O N

The Arbitrator rules in the affirmative (yes).

(B) DID THE EMPLOYER'S FAILURE TO FURNISH THE ASSOCIATION  
WITH A COPY OF ITS WORK RULES IN VIOLATION OF  
ARTICLE 14, SECTION 14.01 OF THE LABOR AGREEMENT  
NEGATE ITS CONTRACTUAL RIGHT TO SUSPEND THE  
GRIEVANT FOR JUST CAUSE?

D E C I S I O N

The Arbitrator rules in the negative (no).

IV.

O P I N I O N

(A) THE GRIEVANT'S TWENTY (20) DAY SUSPENSION WAS FOR  
JUST CAUSE PURSUANT TO ARTICLE 3, SECTION 3.01  
OF THE LABOR AGREEMENT.

This Arbitrator is reluctant to countenance a disciplinary suspension for inadequate job performance except in the most compelling circumstances. Accordingly, and as in all cases of this type, the Arbitrator has searched the evidentiary record before him for some rational or plausible basis upon which to sustain the grievance and cleanse the grievant's employment record. Although the Arbitrator has indulged in every reasonable presumption in favor of the grievant, this search has been in vain.

In response to the Employer's evidence detailing the nature and extent of the incidents of July 21, July 30, September 2, and September 25, 1986, which resulted in the decision to suspend the grievant for twenty (20) days, the grievant did not testify at the evidentiary hearing before



the Arbitrator and the Association presented no evidence to challenge the occurrence of those incidents. To this extent, the evidentiary record in this case provides the Arbitrator with no reason or factual basis to doubt the Employer's version of these four (4) incidents.

In support of the grievance, the Association contends that the grievant's suspension was contractually deficient because none of the four (4) disciplinary incidents upon which the Employer relied was followed by an oral or written reprimand. The Association argument is without merit. Although numerous collective bargaining agreements do provide that oral or written reprimands must accompany each disciplinary incident prior to the imposition of suspension or discharge, the present Labor Agreement (Article 13) provides only that "the following system of progressive discipline will be ordinarily followed". Article 13 is advisory and not mandatory in nature and does not make a disciplinary suspension contingent upon the Employer's prior use of oral or written reprimands. Any claim that the Employer somehow lulled the grievant into believing that her actions on July 21, July 30, September 2, and September 25, 1986, were acceptable to the Employer and not subject to an eventual disciplinary response is contrary to undisputed evidence that the grievant knew or reasonably should have known either during the course of or after each of these incidents that her acts or omissions were improper and violative of Employer policy.

The Employer's decision to impose a twenty (20) day suspension upon the grievant effective November 12, 1986, was both procedurally and substantively compatible with the Labor Agreement and well founded upon just cause.

(B) THE EMPLOYER'S FAILURE TO FURNISH THE ASSOCIATION  
WITH A COPY OF ITS WORK RULES IN VIOLATION OF  
ARTICLE 14, SECTION 14.01 OF THE LABOR AGREEMENT  
DID NOT NEGATE ITS CONTRACTUAL RIGHT TO SUSPEND  
THE GRIEVANT FOR JUST CAUSE.

It is an established principle of labor arbitration that an employer's failure to post or otherwise provide the bargaining unit representative with a copy of the work rules which govern the conduct of the bargaining unit will not vitiate or bar employer discipline against a member of the bargaining unit who has actual knowledge or in the exercise of reasonable diligence and common sense should have known that his or her acts or omissions were violative of employer policy and subject to a disciplinary response. This doctrine is fully applicable to the present case where not a scintilla of evidence was presented to indicate that the grievant was unaware that her acts and omissions on July 21, July 30, September 2, and September 25, 1986, were violative of the Employer's policies and rules for the bargaining unit. On the contrary, the Employer produced unchallenged evidence that prior to each of the four (4) inci-

dents which triggered the twenty (20) day suspension at issue in this case, the grievant received in service guidance and/or specific instructions as to what was expected of her in each of the situations for which she was subsequently disciplined. To this extent, and limited to the specific facts of this case, the Employer's failure to provide the Association with a copy of the bargaining unit work rules in accordance with Article 14, Section 14.01 of the Labor Agreement was de minimus in nature and insufficient to bar the Employer from disciplining the grievant for her repeated deficiencies in conduct. The Arbitrator finds on the basis of clear and convincing evidence that at or prior to each of these four (4) incidents, the grievant knew or in the exercise of reasonable diligence and common sense should have known that her acts and omissions for which she was subsequently disciplined were improper and violative of Employer policy.

In all disciplinary cases, this Arbitrator scrutinizes the evidentiary record before him to make absolutely certain that the grievant has not been the victim of discrimination or lack of evenhandedness on the part of the employer. It is axiomatic that an employer's use of discipline against an offending employee will not be upheld where the grievant has been the victim of unjustified disparity of treatment or a double standard of discipline.

Against this background, the Arbitrator has found no evidence in the evidentiary record before him to suggest that the grievant was the victim of any disparate discipline in terms of cases comparable to hers or that the Employer has tolerated wrongful conduct such as hers in the past and in similar situations. To this extent, the Arbitrator is satisfied and finds (1) that the grievant was afforded due process in the Employer's handling of her case and (2) that the decision to impose a twenty (20) day suspension upon the grievant effective November 12, 1986, was neither arbitrary, capricious nor discriminatory.

For the reasons herein stated, the grievance of Barbara J. Edwards is denied in its entirety.

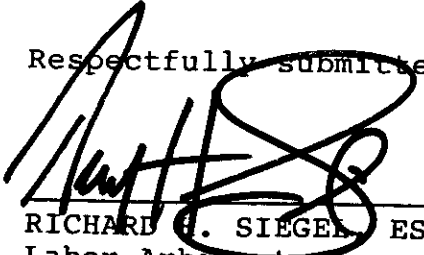
V.

A W A R D

The grievance of Barbara J. Edwards is denied in its entirety.

Dated: May 27, 1987.

Respectfully submitted,



RICHARD J. SIEGEL ESQ.

Labor Arbitrator  
Suite 700  
Three Commerce Park Square  
23200 Chagrin Boulevard  
Cleveland, Ohio 44122  
(216) 831-3282