

AWARD #59/87

IN THE MATTER OF THE
ARBITRATION BETWEEN

Department of Rehabilitation
and Correction

and

OCSEA/AFSCME, Local 11

Grievance No. G-86-0807

Grievant: Solitaire Dispasalgne

Hearing: May 6, 1987

(Briefs received 5-29-87)

For the Employer: Felicia Bernardini

For the Union: Linda K. Fiely, Esq.

Present at the hearing in addition to the Grievant, the Grievant's counsel, and the employer's advocate were Nicholas G. Menedis (DRC), Robert L. Hurt (DRC), Edward Flynn (DRC)

Sequestered witnesses were Donna Burris (employer), Karen Clawson (employer), Sandra Derleth (employer), Linda Zeckes (employer), Lisa Barrera (Union).

Preliminary Matters:

The parties both agreed to permit the Arbitrator to record the hearing so that the Arbitrator might refresh her memory, if necessary. Both parties acknowledged that the tapes would be destroyed when the opinion was rendered. Both parties agreed that the Arbitrator could publish the opinion.

Both employer and union stipulated that the issue was properly before the Arbitrator. The parties agreed that the issue is "WAS THE DISCIPLINE (SUSPENSION) IMPOSED FOR JUST CAUSE."

Relevant Contract Provisions

§ 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 of another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§ 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand
- C. Suspension
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§ 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the prediscipline 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.

§ 25.06 - 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.

§ 24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action.

§ 29.01 - Accrual

Employees will earn eighty (80) hours of sick leave per year credited as of the pay period including December 1. Permanent part-time employees on pay status for less than a full year and full-time employees hired after the December 1 pay period will accrue sick leave prorated at three and one-tenth (3.1) hours per each eighty (80) hours of completed service. Sick leave shall be charged when used at one hundred percent (100%) of regular rate of pay. Upon the effective date of this

Agreement, the additional sick leave days will be prorated.

Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee or a member of his/her immediate family or because of medical appointments or other ongoing treatment. The definition of "immediate family" for purposes of this Article shall be: spouse, significant other who resides with the employee, child, grandchild, parents, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparents, brother, sister, brother-in-law, sister-in-law or legal guardian or other person who stands in place of a parent.

A period of up to ten (10) working days of sick leave will be allowed for parenting during the postnatal period or following an adoption.

The amount of sick leave charged against an employee's accrual shall be the amount used, rounded to the nearest one half (1/2) hour. Employees shall be paid for sick leave used at their assigned step including longevity. After employees have used all of their accrued sick leave, they may choose to use accrued vacation, compensatory time or personal days or may be granted leave without pay.

§ 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.

§ 31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon request for the following reasons:

A. If an employee is serving as a union representative or union officer, for no longer than the duration of his/her term of office up to four (4) years. If the employee's term of office extends more than four (4) years, the Employer may, at its discretion, extend the unpaid leave of absence. Employees returning from union leaves of absence shall be reinstated to the job previously held. The person holding such a position shall be displaced.

B. If an employee is pregnant, up to six (6) months leave after all other paid leave has been used.

C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. If the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work.

The Employer may grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year. Appropriate reasons for such leaves may include, but are not limited to, education; parenting (if greater than ten (10) days); family responsibilities; or holding elective office (where holding such office is legal).

The position of an employee who is on an unpaid leave

of absence may be filled on a temporary basis in accordance with Article 7. The employee shall be reinstated to the same or similar position if he/she returns to work within one (1) year. The Employer may extend the leave upon the request of the employee.

If an employee enters military service, his/her employment will be separated with the right to reinstatement in accordance with federal statutes.

Work Rules

8. Twenty-four hour post employees must report off at least (2) hours BEFORE the scheduled starting time, unless an emergency makes it impossible. All administrative personnel not on 24 hour post coverage must report off at least 1/2 hour AFTER scheduled starting time. Call-in must be made on each day of absence at (614) 877-4367 ext. 448 unless authorization is given by a physician for a specific period of time. The person receiving such notification will fill in the request for leave form, and give it to his supervisor. The report shall contain all the information, such as time of report, date, nature of illness or injury, death of a member of the immediate family, where your presence is required, and, if possible, the length of time the employee is expected to be absent from duty.

All Request for Sick Leave forms are to be turned into your Supervisor on the first day you return to duty. Any request not turned in to the Personnel Office by Monday at 9:00 a.m. following the end of a pay period, will result in a NO PAY status for the days of absence. Employees failing to comply with sick leave rules and regulations will not be paid. Application for sick leave with intent to defraud will result in dismissal and refund to the State of salary or wage paid during such sick leave.

A request for leave form must be filled out even if an employee has exhausted all of their sick leave. Vacation, personal leave, comp time or leave without pay may be used after sick leave has been exhausted.

Facts

The Grievant is an Account Clerk I with ODRC. She has held this position since August, 1982. She began to work for ODRC when the prison was located in Columbus and continued to work for the prison when the facility was moved to Orient, Ohio. The facility was moved in late summer of 84.

The Grievant's evaluations for 10/22/82, 12/20/82, and 8/23/83 show a good employee. The Grievant's evaluation of August 23, 1984, almost coincident with the move to Orient, showed marked decline in all indicators. This decline was attributed, by her supervisor, to a long illness and "tension". The remarks of the

superintendent include the words "needs to improve her attitude". The Grievant's evaluation of September 1985 is similar to her immediately prior evaluation. Her supervisor indicated that the Grievant's continued illness was affecting her work. The reviewer's remarks indicated an assessment that the Grievant "can do better". All of these evaluations were signed by the Grievant. However, a long handwritten statement was attached to the evaluation of September, 1985 by the Grievant. She alludes specifically to problems with transportation and illness. She also cites the lack of opportunity for advancement. (See evaluations: Joint Exhibit 4)

On September 10, 1985, Deputy Superintendent Hurt sent an IOC to Superintendent Stickrath on the Grievant's use of LWOP. This memo indicates that 1) the Grievant's supervisor, Donna Burris, was disapproving LWOP requests because the Grievant had negative sick leave balances, 2) the deputy Superintendent had counseled the Grievant on these problems and suggested possible rescheduling of appointments with her doctor and 3) some of the LWOP was for personal business not medical leaves. (Employer's Exhibit #1) After the counseling, on November 22, 1985, the deputy superintendent wrote to the Superintendent requesting that the Grievant be disciplined for unapproved leaves without pay which were taken subsequent to the counseling. (Employer's Exhibit #2) This request for discipline was approved. However, no record exists that the discipline was ever imposed. The Grievant testified that she remembered the counseling but does not remember

any discipline.

On March 7, March 10, and March 14, 1986, the Grievant was cited by an officer on the gate for bringing non-work related items improperly into the prison after being warned on March 4th about the same situation. On March 10, 1986, Ms. Burris, Grievant's supervisor wrote the deputy superintendent pointing out that the policy (re: personal items through the gate) was not being uniformly enforced. (Employer's Exhibit #3)

On March 28, 1986, the Superintendent issued a statement to all staff reminding all staff of the rules on personal items. On the same day, the Superintendent met with the Grievant and counseled her on this policy.

On April 1, April 2, and April 4, three incident reports were filed by the same officer at the gate because Grievant refused to abide by the policy. On April 8, 1986, the Grievant was counseled on this issue by Deputy Superintendent Hurt. On April 15, 1986, subsequent to that conference Deputy Superintendent Hurt requested permission to issue discipline in connection with the April incidents. On April 21, 1986, the Grievant was given a written reprimand for "disobeying written orders and ignoring a direct order from the Superintendent". The Grievant refused to sign the written reprimand acknowledging receipt. At the arbitration hearing, the Grievant testified that she refused to sign because she was being harassed.

On June 6, 1986, the Grievant notified ODRC that she intended to resign on June 20, 1986. She cited as her reasons that her

supervisor was going to be leaving, that this departure would create a "stressful situation in the cashier's office and I choose to hold on to my sanity." In a handwritten statement accompanying her resignation, the Grievant expressed her discontent with her employer's lack of compassion with regard to her transportation problems, her belief that she was being harassed with regard to the gate problem when in reality the employer should commend her for exercising. (The materials at issue were a gym bag and gym clothes.) She alleged that she was being constantly harassed and ridiculed. She also said that the institution was responsible for her mother's death. (At the arbitration hearing, the Grievant was asked if she did not believe now that her mother's death was coincidental and not the responsibility of the institution. The Grievant maintained, however, that her mother's death was the responsibility of the institution.)

Although, no paper record was introduced on this point, the Grievant apparently withdrew her resignation. About June 20, 1986, Ms. Burris, the Grievant's supervisor, retired. Mr. Carl May was named formal supervisor of the Cashier's Office and Ms. Sandy Derleth was named acting functional supervisor. Ms. Derleth was an Account Clerk II.

On July 17, 1986, Ms. Derleth filed an incident report because the Grievant allegedly refused to follow Ms. Derleth's orders. (Employer's Exhibit #11) As a consequence of the filing of the incident report, Deputy Superintendent Hurt directed Mr. May to have a conference with the Grievant and determine the

facts. On July 18, 1986, Mr. May had a conference with the Grievant and, according to his IOC, told her that "she was to do what Mrs. Derleth told her to do." The Grievant, he wrote, told Mr. May that she would do so. The Grievant, in her testimony, acknowledged this meeting and its content.

On July 25, 1986, Ms. Derleth again filed an incident report on the Grievant. Again, the issue was the Grievant's refusal to follow a direct order, in this case, an order to pick up the Commissary slips. In her testimony, the Grievant said she refused to interrupt the work she was doing to get the slips. The Grievant said she eventually got the slips. Testimony of all parties (Derleth, Burris, Zeches, Clawson, and the Grievant) agreed that one of the Grievant's tasks was to pick up the commissary slips. An officer called the cashier's office when the slips were ready and indicated that he was sending an inmate with the slips. The Grievant's job was to meet the inmate at a designated spot (apparently a gate) and receive the slips. Promptness was an issue because the inmate was not allowed to stand around at the gate; he was to deliver the slips and return.

On July 30, 1987, Carl May reported to the Deputy Superintendent that he had counseled with the Grievant with regard to the commissary slip incident. Mr. May stated that in his opinion the Grievant was insubordinate, and he concluded that the Grievant's behavior warranted disciplinary action. He reported this to Hurt. (Employer's Exhibit #13)

On July 28, 1986, Ms. Derleth wrote an IOC to Mr. Hurt. The

gist of the memo was that the Grievant had created a double entry of one receipt in order to balance the books and cover a mistake of missing two other receipts. (Employer's Exhibit #10) In her testimony at the arbitration hearing, the Grievant indicated that she was not told of the incident until sometime afterward. She said she did not do it on purpose rather she was probably interrupted. In answer to a follow up question, the Grievant then said that Ms. Derleth "told me to write the two receipts."

On July 30, 1986, Ms. Derleth filed another incident report. This report alleged that the Grievant had breached security because when she (the Grievant) was alone in the office, she left the cashier's office, leaving the door open. (Employer's Exhibit #12) At the hearing, the Grievant testified that she did not remember the incident and that she (the Grievant) had probably gone to the bathroom. To a follow up question, the Grievant then said that Ms. Derleth was in the office when she left.

On August 4, 1986, Ms. Derleth filed two incident reports. (Employer's Exhibits 14A & B) The first report alleged that the Grievant refused to follow her work directions and the second report indicated that the Grievant had eaten her lunch at her desk and then taken a second lunch break.

On August 6 & 7th, Ms. Derleth reported 2 more double lunch breaks by Grievant. At the hearing, with regard to the alleged insubordination on August 4th, the Grievant's explanation of this interchange was that tearing up the old May reports had priority, in her mind, over the July work which Ms. Derleth had ordered her

(the Grievant) to do. On cross-examination, the Grievant maintained that the whole incident was "totally fabricated" by Ms. Derleth.

With regard to the alleged lunch break abuse, the Grievant maintained that she did eat at her desk and that her subsequent absences were trips "probably to the ladies room or maybe personnel".

On August 11, 1987, Ms. Derleth filed an incident report alleging that the Grievant left work without notice or authorization while Ms. Derleth was at lunch. (Employer's Exhibit #15) The other clerk, Ms. Clawson, confirmed the Grievant's departure on that day in her testimony. Ms. Clawson indicated that on her lunch hour and, at the Grievant's request, she (Ms. Clawson) drove the Grievant to the bus stop. The Grievant testified that yes she had left because "probably it was a Friday and she had a doctor's appointment". However, the Grievant testified that she had informed Ms. Derleth and that Ms. Derleth "chose to ignore it".

On August 13, 1986, Ms. Derleth filed an incident report with regard to the Grievant. She alleged that the Grievant had refused a work order and had told her to "Go to Hell". Two other employees filed incident reports confirming this incident. (Employer's Exhibit #8) One employee was from another department. The second employee was Karen Clawson. Ms. Clawson reconfirmed her incident report during her testimony at the arbitration hearing. The Grievant did not directly deny the incident. The

Grievant explained that Ms. Derleth was constantly interrupting her and harassing her. She said that Ms. Derleth liked to "browbeat" people. She testified that she herself was not loud or belligerent.

On August 15, 1986, Mr. May evaluated the Grievant. He rated her very poorly. He stated that "she does not accept supervision". Mr. Hurt commented that she "has developed a very poor, belligerent attitude to many and (to?) supervisors ...". The Grievant refused to sign the evaluation.

In her testimony, the Grievant was asked for her personal observations on Ms. Derleth as her supervisor. The Grievant said that Ms. Derleth did not care for her because she (the Grievant) was a minority. The Grievant testified that she had not known that Ms. Derleth disliked minorities until in a conversation in the office. Ms. Derleth talked about a Mr. Singletary loosing his store and having a big stash of money. On cross examination, the Grievant admitted that Ms. Derleth had lent her money on occasion.

On August 18, 1986, Linda Zeches became the Supervisor of the Cashier's office. The Grievant was absent that day. When the Grievant returned to work, Ms. Zeches counseled the Grievant because the Grievant had not reported off within the proper time on August 18, 1987 (the prior day). In this meeting, Ms. Zeches provided the Grievant with a copy of the call-in policy.

(Employer's Exhibit #17) In her testimony, the Grievant testified that she had called-in, very early.

On August 20, 1986, the Grievant received a copy of ODRC Standards of Employee Conduct. (Joint Exhibits #6 & #7) On August 21, 1986 by IOC, Ms. Zeches issued a Memo of Understanding to all three of the employees of the Cashier's Office. Among the rules pointed out were the following:

- b) doors to be closed;
- c) all requests for leave submitted promptly and proper;
- d) follow the change of command;
- e) no personal business over phone or by mail at the prison;
- h) lunch breaks are 45 minutes
- i) inform her when you leave office for over 5 minutes;
- j) starting time at 8:00 a.m.;
- k) no further leave approved except on emergency basis until work was up-to-date.

In this memo, Ms. Zeches indicated that her job as Supervisor was to prioritize work.

In their testimony, Ms. Clawson and Ms. Derleth said that a number of these items applied to their behavior. They testified that the tightening of rules effected them all equally and were applied equally. Ms. Zeches testified that she found the work of the whole office severely behind when she took over and that many policies were not being obeyed. The Grievant testified that Ms. Zeches was from August 19, 1986 immediately hostile to her (the Grievant).

On August 26, 1986, Ms. Zeches wrote an IOC to the Grievant.

In this Memo she made 4 points.

- 1) no leave will be approved unless for emergency,
- 2) personal effects were to be removed from the office floor and the office,
- 3) the Grievant was to watch for employees needing assistance at the window and was to stop other work and assist them, and
- 4) all doctor appointments should be submitted 48 hours in advance. (Employer's Exhibit #20)

In her testimony, Grievant alleged that Ms. Zeches threw such memos at her. The Grievant testified "She (Ms. Zeches) gets mad because I don't read them (the memos)." The Grievant said she did not have time to read Ms. Zeches memos because she was usually doing "priority" work.

On August 26, 1986, Ms. Derleth filed an incident report about the Grievant. In this report, Ms. Derleth alleged that the Grievant refused to talk to her about an imbalance in the books and refused to answer questions about the problem. Ms. Derleth claimed that the consequence of the Grievant's silence caused she and Ms. Clawson to need 2-1/2 hours to find the error. (Employer's Exhibit #9) Ms. Derleth testified to this incident at the hearing and Ms. Clawson confirmed Ms. Derleth's account. The Grievant testified in reference to this incident that when she made a mistake she always told Karen about it.

On August 26, 1986, Ms. Zeches sent a Memo of Understanding to the Grievant telling the Grievant the LWOP forms should be

submitted to her (the supervisor) not Mr. Hurt (the Deputy Superintendent). (Employer Exhibit #22A) On that same day, Ms. Zeches sent a second memo to the Grievant requesting her to be sure that her daily work tape balanced and to inform others if an imbalance occurred. Ms. Zeches was asked by the counsel for employer why she sent written IOC's to the Grievant. Ms. Zeches testified that the Grievant refused to answer and often refused to look up from her desk.

On August 27, 1986, Ms. Zeches filed an incident report explicitly alleging insubordination on the part of the Grievant. Allegedly, the Grievant was told to pick up the commissary slips by Ms. Zeches. The Grievant left and returned. Shortly thereafter, the officer at the gate called and indicated that the inmate was still waiting at the gate to turn over the slips and had been waiting for some time. According to Ms. Zeches, the Grievant said "nobody was there". Ms. Zeches then gave her a direct order to return and pick up the slips. According to Ms. Zeches, the Grievant waited a while and then stormed out of the office, slamming the door as she went.

On the same day, August 27, 1986, Ms. Zeches filed a second incident report. She alleged that the Grievant refused to turn over the old kite log and refused instruction on how to use the new kite log. A third incident report that day alleged a third refusal to follow directions. This third report indicated also that the Grievant was habitually gone from the office and her work was behind. (Employer's Exhibits #21A, B, C) Ms. Zeches gave the

Grievant an IOC on August 27, 1986, which reiterated that she (the Grievant) was ordered to pick up the commissary slips. When asked by her counsel about these events, the Grievant testified that "She (Ms. Zeches) did not counsel me; she just told me to pick up the slips." The Grievant maintained that the job was not assigned to her and that all members of the Cashier's Office took turns doing commissary slip pick up. With regard to the kite log, the Grievant testified that she had done kites a long time and knew her job and that the lines on the new log were too small. The Grievant testified on cross examination that Ms. Zeches was lying when she testified that the kites were behind schedule. The Grievant further testified on cross examination that she did not read the IOC's Ms. Zeches gave her because she "did not have the time". She said she was not caught up because when she took a day off, she got behind in her work.

On September 19, 1986, Grievant was suspended for three days for neglect of duty and failure of good behavior. The reasons cited were

- 7-30-86 breach of security;
- 7-8-86 failure to issue proper receipts;
- 8-13-86 failure to obey supervisor and telling supervisor to go to hell;
- 8-27-86 refusal to pick up commissary slips.

In addition, the suspension notice indicated that Grievant had used unapproved LWOP without following procedures. In particular, the suspension notice noted that on 8-5-86 the Grievant had

reported off without prior notice for a doctor's appointment known of in advance and that on 8-21 while taking unauthorized LWOP, the Grievant had failed to call-in within the prescribed time.

Much other evidence was introduced and testified to by both sides with regard to leave without pay. The Arbitrator shall not report on all that evidence for reasons discussed below. All other incidents (with minor exceptions) reported in the written reports were confirmed by Burris, Zeches, Clawson and Derleth. The Grievant reviewed all those incidents, confirming most in terms of their general occurrence. The Grievant's testimony, however, outlined her experience of those situations. The Grievant testified that Ms. Burris was a supervisor who was unlike any supervisor she had ever had. She said Ms. Burris "asked" her to do things and essentially let her work at her own speed and set her own priorities. She characterized Ms. Derleth as "browbeating," "harassing" and as "on her all day about trivial things". She described Ms. Zeches as hostile to her from the first day. When asked why she did not follow Ms. Derleth's directions, the Grievant said "well she was wrong. She only did things to create a favorable impression." The Grievant also testified that Mr. Hurt showed no compassion about her problems. Lastly, on cross examination, the Grievant maintained that she retained the right to prioritize her own work.

Union Position

The union maintains

1. That the employer had not met the burden of proof because each and every incident must be proven and were not,
2. That the incidents proven did not warrant the discipline imposed,
3. That the written rules cited and established by the employer are unreasonable,
4. That the policy on prior approval of leaves imposed by Ms. Zeches was improper and contradicted the policy of the total prison,
5. That the Standards of Employee Conduct are objectionable in total for 4 reasons,
6. That the employer had not followed progressive discipline,
7. That prior to the three day suspension the employer had not enforced absence policy and hence Grievant had a right to rely on "negative notice" that she would not be harshly disciplined for absenteeism, and
8. That the Grievant should not be harshly disciplined for her refusal to obey oral directives of Derleth and Zeches because those orders were to do different work and under the prior supervisor she was allowed to work at her own pace and priorities. Secondly, the union

maintains that Derleth's and Zeches directive were unreasonable and designed to antagonize.

Employer's Position

The employer maintains

1. That the burden of proof has been met not only by the testimony of Zeches, Derlith, and Clawson but also because of the lack of credibility of many of Grievant's statements under oath,
2. That given the sheer number of incidents, the employer actually minimized the discipline called for,
3. That the rules are reasonable, and that Grievant had notice of them,
4. That Ms. Zeches' rules on leave requests did not violate sections 29.01 and 31.01 of the contract because a) the rules did not deprive Greivant of any accrued leave (she had none) and b) the contract clearly makes LWOP for medical reasons discretionary with the employer,
5. That the standards of Employee Conduct are permitted under § 43.03 of the contract,
6. That the Employer did follow progressive discipline in that Grievant had notice and was counseled before discipline was imposed, and
7. That Grievant's failure to obey orders predated the incidents under Derleth and Zeches and that such

refusals indicated a pattern of behavior which accumulated to such an extent as to require discipline.

Discussion:

The Arbitrator will not discuss the LWOP issue per se because of three reasons:

- a) The Arbitrator is persuaded by the union's argument that prior enforcement of the LWOP policies was lax and confused and that this laxness and confusion was certainly created by Supervisor Burris but was also acquiesced in by Deputy Superintendent Hurt. Such enforcement created real problems of adequate notice to the Grievant. The arbitrator does not condone the Grievant's apparent abuse of and disregard for these rules; however, the burden is on management to clarify the rules and enforce them uniformly.
- b) The issue of LWOP is complicated by the Grievant's illnesses and her unclear involvement with EAP.
- c) The issues surrounding the LWOP are basically irrelevant to the central issues of this case.

When Grievant was suspended on September 23, 1986, she was cited with numerous rule violations. Leaving aside LWOP issue, the Grievant allegedly a) breached security on 7-30-86; b) failed to write receipts properly on 7-8-86; and c) failed to call-in properly on two occasions. However, she was also cited with

1 numerous incidents of "disrespect and insubordination to supervisors and coworkers". In particular, an incident on 8-13-86 involved alleged insubordination to Ms. Derleth and an incident on 8-27-86 involved alleged insubordination to Ms. Zeches.

The Arbitrator, upon review of the evidence, finds that the Grievant did leave the office unoccupied and did "fudge" a receipt to cover an imbalance. Between Ms. Derleth and the Grievant, Ms. Derleth was more credible. The Grievant's testimony on these incidents was contradictory and not believable. However, those two rule violations taken alone are insufficient to justify the discipline given.

2 Before looking at the incidents of insubordination alleged, the Arbitrator notes the "stance" of the Grievant with regard to the same issue at the time of the incidents. In March of 1986, the Grievant refused to abide by "gate" rules three times. These incidents were put aside when uneven application of the rules were brought to the attention of the Superintendent. The Superintendent re-issued the rules and counseled the Grievant on the rules. Subsequently, the Grievant repeated her behavior and was disciplined with a written reprimand for failure to follow a direct order. The occurrence of these incidents is not at question. The Grievant admitted them. Her position was that the rules were unreasonable. If an employee believes rules to be unreasonable, his or her duty is to obey them (unless unsafe) and then grieve them. The Grievant testified that she understood the method. The "gate rules" while inconvenient and perhaps annoying

were not unreasonable for a penal institution.

So prior to the alleged incidents underlying the suspension, Grievant had been counseled and received a written reprimand for refusal to follow a direct order. She was subsequently counseled on the same issue. On July 18, 1986, Mr. May counseled with the Grievant and told her she must follow Ms. Derleth's orders. The Grievant admitted receiving this counseling and testified that she understood that Ms. Derleth "was in charge of her (the Grievant's) work". On July 30, 1986, Mr. May again counseled with the Grievant over refusal to obey orders. The Grievant denied that on August 13, 1986 that she told Ms. Derleth to "go to Hell" but she admitted refusing to obey her. On August 15, 1986, Mr. May put Grievant clearly on notice as to the problems of insubordination through her evaluation. While the Grievant refused to sign the evaluation, she admitted reading it. On August 27, 1986, the Grievant refused to carry out Ms. Zeches order to get the commissary slips. The Grievant persisted in denying that this task was her responsibility despite the record clearly showing a prior discussion on this very issue the month before with Mr. May and the testimony of all other witnesses. At this point, the Grievant received a three (3) day suspension for actions including insubordination.

Probably no rule is clearer than the rule that an employee is to obey supervisory orders unless his or her safety or health is in jeopardy. The employee has the right to grieve those orders. The Grievant's own testimony makes clear that she refused

legitimate orders because she believed she had a right to decide her own work duties, priorities, and pace. Such a belief flies in the face of work place reality. The union requests that the Grievant's refusals be condoned because a prior supervisor had essentially let the Grievant behave as she wished. An argument is well made that a change in the rules requires notice. In her own writing, the Grievant made clear that she knew a new supervisor would bring new rules. (Resignation letter) That information aside, the Grievant was clearly on notice that refusal to obey an order meant discipline. Secondly, she was clearly on notice (two counseling sessions with Mr. May) that she was obligated to obey a supervisor, including Ms. Derleth. Lastly, she had specific prior notice with regard to an order to pick up commissary slips.

The Arbitrator finds that the Grievant was insubordinate on at least the two incidents charged, that the Grievant had received significant prior discipline for insubordination, that the Grievant was on clear notice as to these issues, that the discipline given was progressive, (see § 24.02) and that the employer rather than being insensitive to Grievant's situation was flexible and patient.

Decision:

Grievance Denied.

Date

Rhonda R. Rivera, Arbitrator

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Decision:

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Date June 10, 1987

Rhonda R. Rivera
Rhonda R. Rivera, Arbitrator

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