Bill Johnson

#109

IN THE MATTER OF THE

ARBITRATION BETWEEN

OCSEA/AFSCME, Local 11,

Union

and

The State of Ohio
Department of Mental Health

Employer

OCB Grievance
No. G-87-0846
Grievant: Wilma Gilmore

Hearing Date:
September 28, 1987
Brief Date:
October 26, 1987

For the Union: John T. Porter, Esq.

For the Employer: Victoria Ullman, Esq.

Present at Hearing: Wilma Gilmore (Grievant), John T. Porter (Counsel: OCSEA), Cathy Ellis (Steward and Witness), Victoria Ullman (Counsel: ODMH), Tim Wagner (OCB), Joan Lackey (Witness), Nadine Colgate (Witness), and Laura Hawkins (Witness).

Preliminary Matters

The Arbitrator asked permission to tape the proceedings, solely to refresh her memory. She indicated that the tapes would be destroyed on the day that the award was rendered. The parties granted permission to record. The Arbitrator requested permission of the parties to publish the Award. Both parties

granted permission. The parties stipulated that the Grievance was properly before the Arbitrator. No side wished the witnesses sequestered. All witnesses were sworn by the Arbitrator. At one point during the proceedings, the Arbitrator attempted to settle the Grievance; no settlement was reached.

Relevant Contract Sections

§ 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.

§ 24.02 - Progressive Discipline (in part)

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

A. Verbal reprimand (with appropriate notation in employee's file)

B. Written reprimand;

C. Suspension;

D. Termination.

§24.05 - Imposition of Discipline (in part)

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

§ 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.

§ 25.03 - Arbitration Procedures (in pertinent part)

Only disputes involving the interpretation, application or alleged violation of a provision of the 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 he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Facts

The Grievant was employed by the Ohio Department of Mental Health at the Dayton Mental Health Center. She began her employment on December 12, 1981. The Grievant was a psychiatric aide in the forensic unit. This unit houses persons found to be criminally insane. Laura Hawkins, R.N., Coordinator of the Forensic Unit, testified that by agreement and by necessity all forensic units are required to be staffed by two (2) persons at all times. No one may report off duty until the unit is covered. Hawkins testified that staff absenteeism and/or tardiness caused serious problems because of the nature of the wards involved.

The Grievant apparently did not encounter problems at work until approximately March 3, 1983 or 15 months after being hired. Records revealed that on March 3, 1983 Grievant was counseled with regard to tardiness. On May 12, 1983, she was orally warned. On July 21, 1983, she received her first written warning; her second was administered August 12, 1983 (Employer Exhibit #1-A). On November 25, 1983, the Grievant received her Third Written Reprimand for repeated tardiness (Employer Exhibit #1-B).

On January 1, 1984, the Grievant received her performance evaluation for the period 12-26-82 to 12-26-83 (Union Exhibit #4). The evaluation was good, except she received a "4" in Dependability and was advised to "make considerable improvement in this area." On August 10, 1984, the Grievant received a Written Reprimand for "Neglect of Duty" (Employer Exhibit #1-C). On

November 27, 1984, the Grievant received a Written Reprimand for Neglect of Duty for 9 days of tardiness (Employer's Exhibit #1-D). On December 12, 1984, the Grievant received a discipline letter entitled "2nd Written Reprimand" for "neglect of duty" Grievant failed to call in when tardy.

On December 28, 1984, the Grievant received an evaluation for the period 12/26/83 to 12/26/84. Again her work was acceptable even good except for Dependibility. Her Supervisor Nadine Colgate indicated that the Grievant had "made no improvement" in Item 5. The appointing authority indicated that the Grievant's "absenteeism is unacceptable. Start appropriate progressive disciplinary action." The Grievant had notice of this statement.

On September 5, 1985, the Grievant had a personal conference with the Superintendent. The conference came about because her supervisor requested a three (3) day suspension because of continued tardiness. After the personal conference, the Superintendent found that the Grievant had reached a "fourth level offense for neglect of duty." However, the Superintendent also found that the Grievant had serious family problems. In lieu of suspension, the Superintendent accepted the Grievant's participation in EAP under § 24.08.

On November 13, 1985, the Grievant received a 3 day suspension for neglect of duty due to three days of tardiness in September and October of 1985.

On December 5, 1985, the Grievant received her evaluation. Again, the rater's comments were favorable except for #5

Dependability. The rater saw only slight improvement.

On February 19, 1986, Grievant was again suspended for three (3) days for neglect of duty. On May 27, 1986, the Grievant's supervisor asked for corrective action due to excessive absenteeism and tardiness in March, April, and May of 1986. The Superintendent suspended discipline on condition that Grievant enroll in EAP which she did.

On December 11, 1986, the Grievant was suspended for six (6) days for Neglect of Duty for excessive LWOP, late call-ins, tardiness, and AWOL. The suspension was effective January 5, 1987. She was to return to work on Monday, January 12, 1987 (Employer's Exhibit).

On December 16, 1986, the Grievant received her evaluation for the period 12-21-85 to 12-21-86. Item #5 dropped to "3".

Grievant failed to show up for work on January 12, 1987. She testified that she lost the letter and was confused on the return date. The Grievant was dismissed.

At the hearing, the Grievant testified "I care about my job". She regarded her performance as "good" except for tardiness caused by "personal and physical problems". She agreed that the facts as presented by the employer were true. However, she testified that she now had her life together. She indicated that bankruptcy had handled her credit problems, divorce her marital problems, child care her parental problems, a new car her transportation problems and new housing, her housing dilemma.

penalty.

First, the Arbitrator rules that the union's assertion of discrimination is improperly raised at this level. No such assertion was raised below nor at the hearing. Due process notions of fairness would be clearly violated if the Arbitrator were to consider this claim.

Secondly, the Arbitrator accepts the union's argument that the Arbitrator has the power to modify a penalty. The union's interpretation of sections 24.01 and 25.03 when read in pari materia is interesting and creative. However, the Arbitrator's power to modify a penalty if too severe is inherent in the concept of "just cause". If a penalty is "too severe", the justness of the decision at hand fails. However, where management rules provided under the contract are reasonable and fair and where the disciplined behavior falls squarely within those rules, the Arbitrator's discretion is limited solely to her sense of justice being egregiously offended. The power of the Arbitrator to modify an "unjust" penalty is not, however, the issue here. The issue here is one of clemency.

The Grievant violated fair and reasonable rules. She was carefully and progressively disciplined (Article § 24.02). EAP was utilized on at least two occasions (Article § 24.08). The penalty imposed was "reasonable and commensurate with the offense." (Article § 24.05) No evidence was adduced that the discipline was used solely for punishment (Article § 24.05). No procedural rules were broken, and the process was demonstratably

fair.

Clearly, the Grievant has been a person burdened by circumstances often beyond her control. However, the employer has attempted in good faith to help the employee. The real question for the employer was how to balance a human concern for the individual employee as against the needs of the institution and its patients. This latter question is not a question for the Arbitrator. Once the Arbitrator finds just cause as she has here, she must leave the issue of "balance" to management of the institution. Given the nature of the institution, the nature of Grievant's job, and the potential dangers, the Arbitrator cannot find the decision either arbitrary, whimsical, or capricious nor an abuse of power.

Decision

Grievance denied.

Date: November 10, 1987

Rhonda R. Rivera
Arbitrator