#196

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL NO. 11, AFSCME AFL-CIO

MARION DIXSON, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance Nos. G-86-1078 and G-87-1898, Marion Dixson

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was held at the Broadview Development Center, Broadview Heights, Ohio, on April 6, 1988. The record was closed on April 13, 1988, upon receipt of authorities post-filed by the Union with permission of the Arbitrator. The parties have waived the thirty (30) day time period for issuance of this Opinion and Award. They further agreed to allow the Arbitrator to tape record the proceedings and granted permission for publication of this Opinion and Award. This matter has been submitted to the Arbitrator on the testimony and exhibits and authorities offered at the hearing of this matter as well as post hearing authority. The parties stipulated that the grievance is properly before the Arbitrator for decision.

APPEARANCES:

For the Employer:	For the Union:
Tim Wagner Office of Collective Bargaining	Steven Lieber Staff Representative
Tamala Solomon Labor Relations Officer Broadview Heights Developmental Center	Linda Fiely Associate General Counsel OCSEA/AFSCME Local 11

ISSUES

This matter involves two grievances which have been consolidated for purposes of the arbitration hearing and this Opinion and Award. The parties stipulated that the issues before the Arbitrator are:

(1) Was the Grievant, Marion Dixson, suspended for 30 days for just cause?

If not, what shall the remedy be?

(2) Did the Department of Mental Retardation and Developmental Disabilities terminate Marion Dixson for just cause?

If not, what shall the remedy be?

PERTINENT AUTHORITIES AND CONTRACTUAL PROVISIONS

Section 4117.08(C), Ohio Revised Code.

> Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:
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> * * *
>
> (2) Direct, supervise, evaluate, or hire employees:
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> * * *
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> (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:
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> * * *
>
> (8) Effectively manage the work force. . .

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee reserves, retains and possesses, soley and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(C) numbers 1-9.

* * *

ARTICLE 24 - DISCIPLINE

§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

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.

§24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action.. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§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 situation 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.

§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.

ARTICLE 25 - GRIEVANCE PROCEDURE

§25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

§ 25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under

consideration. Such request shall not be unreasonably denied.

ARTICLE 43 - DURATION

§ 43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

GRIEVANCE NO. G-86-1078

POSITION OF THE EMPLOYER

The Employer had just cause to suspend Marion Dixson, Hospital Aide, for a period of thirty days for neglect of duty. On September 9, 1986, client T.S. escaped from Cottage 283 while in the care and custody of the Grievant. The clients residing in Cottage 283 are severely and profoundly mentally retarded with I.Q.'s between 20 and 25. Client T.S. is a wheelchair client with a history of escape attempts. He was found outside the cottage before Grievant was aware that he was missing. This was a violation of the Employer's written policy, of which the Grievant was on notice, that he know the whereabouts of all the residents in his care at all times (Joint Exhibit 5). Violation of that written policy subjects the Grievant to progressive discipline within the terms of the corrective action procedure in effect at that time. Employer's Policy Number L-5, Section IV., C. 9. b. (Joint Exhibit 4), the Grievant had just received a

fifteen day suspension in July, 1986, for failure of good behavior. Therefore, this thirty day suspension constitutes progressive discipline.

Further, the Grievant has not received disparate treatment by this discipline. An employee on the shift prior to Grievant's received a twenty-day suspension as a result of the same escape incident. Grievant deserved a lengthier suspension because he was responsible for leaving the cottage door unlocked, which facilitated the escape by T.S.

POSITION OF THE UNION

The Employer lacked just cause to impose a thirty-day suspension for "resident neglect" on Marion Dixson, employed as a Hospital Aide 1 since September, 1985. On September 9, 1986, Grievant was assigned to the first shift (7:00 a.m. - 3:30 p.m.). At 7:15 a.m., prior to the acceptance by Grievant of his assigned care unit, Grievant's supervisor telephoned him to inquire as to the whereabouts of client, T.S. who had escaped from the unit. Grievant had locked the security door behind him upon his entry to the cottage; additionally, Grievant had previously reported that the security door lock was faulty. While Grievant admittedly had some responsibility for cottage residents prior to accepting the care unit it was primarily the responsibility of the previous shift's staff to watch the clients while the Grievant was conduncting his pre-acceptance inspection.

Further, even accepting for the sake of argument that Grievant was justifiably subject to discipline, a thirty-day

suspension is overly severe. Prior to this thirty-day susupension for "resident neglect" the Grievant had received only one prior discipline, a fifteen-day suspension for "failure of good behavior". Mark Gostlin, the third-shift employee being replaced by Grievant, only received a twenty-day suspension for the same incident. Gostlin, who also had received a prior fifteen-day suspension, was disciplined for two separate rules infractions - resident neglect for this incident and neglect of duty for a later violation following this incident. Therefore, in effect, Gostlin received only a ten-day suspension for this particular violation as compared to the thirty-day suspension levied against the Grievant.

FACTUAL BACKGROUND

Grievant, Marion Dixson, commenced employment as a Hospital Aide I at Broadview Developmental Center on September 15, 1985. He had received one prior discipline of a fifteen-day suspension for failure of good behavior for an incident which occurred on June 20, 1986.

On September 9, 1986, Grievant was assigned to work the first shift at Cottage 283 from 7:00 a.m. to 3:30 p.m. He was to relieve third-shift employee Mark Gostlin. While both employees were still in the cottage at approximately 7:15 a.m., a supervisor telephoned the cottage to ask Dixson if he knew the whereabouts of client T.S. Shortly before that time Nathaniel Parker, a Hospital Care Supervisor, found T.S. outside Cottage 283 attempting to reach the street. The residents of Cottage 283

are profoundly retarded with mental ages of thee years or less. T.S. is a wheelchair patient who is nonetheless very mobile and has a history of running away from the cottage, a tendency well known amongst the Center's employees.

OPINION

By Contract the Employer bears the burden of proof to establish just cause for the thirty-day suspension levied against Grievant. (Contract, Section 24.01). This Arbitrator has concluded that the Employer had just cause to discipline the Grievant, Marion Dixson. However, in light of the lesser suspension levied against employee Gostlin, the Union has demonstrated that the Grievant has been subjected to disparate treatment and that the length of the suspension must be reduced to meet just cause standards.

The evidence and testimony of Dassie Matsuoka, establishes that the Grievant reported to his superiors that the rear entrance security door to Cottage 283 A had a loose and faulty lock (Union Ex. A) several days prior to September 9, 1986, the day of the incident which underlies this grievance. But this evidence does not excuse the Grievant from compliance with the well-established and reasonable work rule requiring him to know the whereabouts of all residents in his care at all times. (Joint Exhibit 5). To the contrary, that knowledge of an increased risk of resident escape heightened the standard of care to be exercised by the Grievant. Ordinarily, this Arbitrator would not hesitate to find just cause for the thirty-day

suspension meted out to the Grievant. That punishment is in line with the Employer's progressive disciplinary grid in effect on November, 1986. (Joint Exhibit 4, Section IV. B.) However, employee Gostlin was jointly responsible for the care of T.S. at the time of his escape and he received the equivalent of a ten-day suspension for resident neglect for the same event; this assumes that Gostlin was disciplined with equal severity for this incident and for an incident of neglect of duty on September 12, 1986.

The Employer has enunciated no credible basis for the disparate disciplines accorded Messrs. Dixson and Gostlin. The claim that the Grievant was disciplined more harshly than Gostlin because he left the door open is not adequately supported by the evidence.

Finally, the union claims that the Grievant was prejudiced by an inadequate and overly vague notice of pre-disciplinary meeting (Union Exhibit B). That notice adequately informed Grievant of the charges against him by incorporating the Staff Incident Report (Employee Exhibit 2) by reference. It further informed Mr. Dixson of the range of possible disciplinary actions against him, including suspension. There is no evidence that he was prejudiced or misled in any way by the contents of that notice.

AWARD

The grievance is sustained in part. The thirty-day suspension levied against Marion Dixson is reduced to a ten-day suspension without pay.

GRIEVANCE NO. G-87-1898

POSITION OF THE EMPLOYER

The Employer had just cause to dismiss the Grievant, Marion Dixson. The Grievant had established a pattern of resident neglect and disregard for the work rules of the Employer. On March 27, 1987, Mr. Dixson chose to deal with a personal situation on the telephone instead of tending to his primary duty to confront an emergency situation threatening the health of a resident. He was insubordinate to a supervisor when given a direct order to get off the telephone and respond to what appeared to be a potentially life-threatening situation. This was the Grievant's third serious disciplinary action within his eighteen months of employment. Therefore, the contractual standards of just cause and progressive discipline have been satisfied.

POSITION OF THE UNION

The Employer violated §24.01 of the Contract by dismissing Marion Dixson without just cause. Grievant was terminated for resident neglect and refusal to obey orders. The evidence is insufficient to establish that resident T.S. was being neglected by the Grievant. To the contrary, the Grievant had dealt with the emergency and first aid was being administered to T.S. by another staff member. Supervisor Billman overreacted to the situation, which was not life-endangering.

The Grievant followed the Employer's written policy on the

handling of unusual incidents as set forth in Employer's Policy Statement P-5 (Joint Exhibit 3). In accordance with that policy he notified his immediate supervisor by telephone and completed the required Unusual Incident Report form. He then cleaned up resident T.S. and took him to the infirmary.

The grievance should be upheld and the Grievant reinstated and made whole.

FACTUAL BACKGROUND

The undisputed relevant facts are as follows. At approximately 3:10 p.m. on March 27, 1987, Geneva Brown of the housecleaning staff discovered resident T.S. in the hall of Cottage 283-A with a razor in his hand and bleeding from cuts on the face and left hand. She removed the razor from T.S.'s possession and took it to the Grievant, Marion Dixson. Mr. Dixson was the sole direct-care staff person responsible for eight residents in 283-A that day until Floyd Brooks returned from an in-service training session. There is a dispute as to the time of Mr. Brooks' return; a determination of that factual issue by this Arbitrator is critical to the outcome of this grievance.

The undisputed evidence would indicate that the Grievant spoke by telephone with his immediate supervisor, Alonzo Robinson, between 3:10 p.m. and 3:15 p.m. at which time the injury to T.S. was reported. Robinson in turn reported the incident to his superior, Unit Director Roy Billman, who promptly went to Cottage 283-A. Upon seeing the bleeding T.S. sitting on

the floor, Billman went to the Staff Office where he found the Grievant on the telephone speaking with Mrs. Dixson. The Grievant requested Mr. Billman to explain to Mrs. Dixson that the Grievant would be required to work forced overtime, and Mr. Billman refused. Depending on whether Mr. Billman or Mr. Dixson have the clearer recollection, this request was made on either the first or second visit by Billman to the staff office.

At approximately the same time, Mr. Robinson was directed by Billman to telephone the institution's security department. Upon going to the staff office to use the phone, Robinson encountered Dixson on the phone with his wife and was forced to use a telephone in the kitchen area of the cottage which, by Mr. Dixson's own estimate, would have taken about one minute to reach "if running".

T.S. was administered first aid and Supervisor Juanita Hundley and the Grievant accompanied T.S. to the infirmary. (Union Exhibit T-B). Later that afternoon the Grievant was relieved of his duties and, on April 24, 1987, received a removal order (Joint Exhibit T-2) effective at close of business on May 4, 1987. This timely grievance followed.

OPINION

The Employer bears the burden of proof by Contract to establish just cause for termination of the Grievant, Marion Dixson (§24.01). The authorities establish that, in a termination case, the Employer must demonstrate by at least a preponderance of the evidence proof of wrongdoing sufficient to

support a discharge. (See, e.g., Elkouri, How Arbitration Works, 3d ed., pages 661-662).

As noted above, there is a sharp conflict between the testimony of the Grievant and his co-worker Floyd Brooks as opposed to that of their supervisor, Alonzo Robinson, and Unit Director Billman. For the reasons which follow this Arbitrator has concluded that Messrs. Billman and Robinson have advanced a more credible explanation for the events of March 27, 1987.

The Arbitrator notes that neither side produced the testimony of several eyewitnesses to part or all of the incident leading to the removal of Mr. Dixson. No conclusion has been drawn by this neutral from the absence from the hearing room of Geneva Brown, Juanita Hundley and Jeff Brown.

The critical factual issue is whether or not Floyd Brooks preceded Messrs. Billman and/or Robinson to Cottage 283-A. Brooks testified that he was already administering first aid to T.S. when Mr. Billman arrived on the scene and that there was no longer any emergency. In contrast to that testimony, Billman testified that Brooks did not appear at the scene for several minutes after Billman's arrival and only after Billman had ordered Dixson to get off the telephone. Billman further testified that T.S. was sitting on the floor, that he was smeared with blood, that there was a "puddle" of blood in T.S.'s lap and that he appeared to have suffered a very serious injury.

Alonzo Robinson generally confirmed the testimony of Mr. Billman. He stated that when Robinson arrived T.S. appeared to have suffered a more serious injury and that T.S. was bloodied

about his hands, face, shirt and pants to the extent that Robinson couldn't tell where the blood was coming from. He also testified that there was blood on the floor. Thus, the testimony of Messrs. Billman and Robinson establishes that Mr. Brooks had not administered to T.S.'s needs prior to the arrival of Mr. Billman.

Having so found, this Arbitrator is led inexorably to the conclusion that Mr. Dixson, with full knowledge that a resident was bleeding and in need of care, engaged instead in a four minute telephone conversation with his wife (Union Exhibit T-C), and that he ignored the demand of Unit Director Billman to end the telephone conversation and tend to his primary direct-care duties.

Contrary to the protestations of the Union, the Grievant's actions were contrary to Policy P-5 (Joint Exhibit 3). That written policy statement provides that upon discovering a major incident such as that confronting Mr. Dixson it was his responsibility to:

(1) Insure that the resident is safe and free from further harm (Par. VI. B. 1.); and

(2) Contact medical staff immediately (Par. VI. B.2)

That same policy statement then directs the responsible employee to notify the Institution's police and inform his supervisor. Nowhere does it suggest that it is appropriate to engage in a four-minute telephone conversation with an off-campus individual for any purpose until after the resident's needs are met.

It is true T.S.'s injuries proved, upon examination by

medical personnel, to be superficial. But it was not the province of the Grievant to unilaterally make that determination and to proceed on that assumption in the face of orders from his supervisor, Mr. Billman, and the procedures set forth in Policy P-5. Nor does this Arbitrator accept Mr. Dixson's assertions that he was the only calm and efficient force amongst inefficient (Institution security personnel and Mr. Brooks) or overreacting (Mr. Billman) co-workers.

Finally, there is no evidence that the Grievant was subjected to an unfair departmental investigation. This dispute basically resolves itself to an isue of the credibility of the witnesses. This Arbitrator finds the witnesses of the Employer more convincing.

The issue of the appropriateness of the discipline remains. Fortunately, T.S.'s injuries proved not to be serious. Nonetheless, at the crucial time period between approximately 3:10 p.m. and 3:30 p.m., the Grievant did not satisfactorily perform his primary duty to care for an injured resident during what appeared to be a serious situation.

The Arbitrator notes, however, that the removal order specifically rests on a finding that the Grievant had received prior fifteen-day and thirty-day suspensions. This Arbitrator has today reduced the latter discipline to a ten-day suspension. Therefore, it must be determined whether the Employer's Policy Number L-5 (Joint Exhibit 4), its disciplinary grid, provides for removal in such circumstances. That grid permits termination in progressive discipline situations only following a thirty-day suspension. Therefore, the charge of refusal to obey orders does

not justify termination in this case. The finding of neglect would permit immediate dismissal only if it were found that the neglect has led to death or severe injury to a client (Par. IV. C. 9. C.). Fortunately, T.S.'s injuries proved to be superficial and did not even require sutures. Therefore, the Employer must once again justify the termination based upon progressive disciplinary standards set forth in its own policy statement. Those standards have not been satisfied.

However, in light of the finding of this Arbitrator of the Grievant's serious neglect, it is determined that this is not an appropriate case for the award of backpay.

AWARD

The Grievance G-87-1898 is sustained in part. There was not just cause for the removal of Marion Dixson. The Grievant is ordered reinstated effective with the work week commencing July 24, 1988. The order of removal is to be modified to reflect a thirty-day suspension. The remainder of time from the end of said suspension until the effective date of the Grievant's reinstatement is to be reflected on the personnel record of the Grievant as approved leave without pay. The Arbitrator declines to award back pay.

Thomas P. Michael, Arbitrator

Rendered this Thirteenth day
of July 1988, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was hand delivered to Eugene Brundige, Director, Ohio Department of Administrative Services, 65 East State Street, Columbus, Ohio 43215; with copies of the foregoing Opinion being hand delivered this 14th day of July, 1988, upon:

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