#199

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

ROBERT SARGENT, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. G-87-1901, Robert Sargent

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 in Columbus, Ohio at the Office of Collective Bargaining, on April 27, 1988. 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. The parties stipulated that the grievance is properly before the Arbitrator for decision.

APPEARANCES:

| For the Employer: | For the Union: |
|---|---|
| David Norris<br>Office of Collective Bargaining | Steven W. Lieber<br>Staff Representatative<br>OCSEA/AFSCME Local 11 |
| Tamala Saloman<br>Labor Relations Coordinator<br>Broadview Heights Developmental Center | Linda Kathryn Fiely<br>Associate General Counsel<br>OCSEA/AFSCME Local 11 |

## ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Did the Department of Mental Retardation and Developmental Disabilities terminate Mr. Robert Sargent 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:
>
> * * *
>
> (2) Direct, supervise, evaluate, or hire employees:
>
> * * *
>
> (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:
>
> * * *
>
> (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 Employer reserves, retains and possesses, solely 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 13 - WORK WEEK, SCHEDULES AND OVERTIME

### §13.06 - Report-In Locations

All employees covered under the terms of this Agreement shall be at their report-in locations ready to commence work at their starting time. For all employees, extenuating and mitigating circumstances surrounding tardiness shall be taken into consideration by the Employer in dispensing discipline.

Employees who must report to work at some site other than their normal report-in location, which is farther from home than their normal report-in location, shall have any additional travel time counted as hours worked.

Employees who work from their homes, shall have their homes as a report-in location. The report-in location(s) for ODOT field employees shall be the particular project to which they are assigned or 20 miles, whichever is less. In the winter season when an employee is on 1,000 hours assignment, the report-in location will be the county garage in the county in which the employee resides.

For all other employees, the report-in location shall be the facility to which they are assigned.

* * *

## 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.

§ 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.

## POSITION OF THE EMPLOYER

The Employer had just cause to terminate Robert Sargent due to his neglect of duty for repeated tardiness. Mr. Sargent was on notice of the possibility that he would be removed due to warnings to that effect which appeared in prior disciplinary suspension notices.

The requirements of the Contract that the Employer follow the principles of progressive discipline have been met. The Grievant has previously received numerous warnings and suspensions for tardiness and other offenses and has had more than ample opportunity to correct his behavior to no avail.

While the Employer recognizes its contractual duty to consider extenuating and mitigating circumstances surrounding tardiness, Mr. Sargent has failed to document his alleged reasons despite ample opportunity to do so throughout the grievance process, up to and including the arbitration hearing. Further, while the Grievant was not tardy for almost a full year prior to the occasions leading to his dismissal, the Employer nonetheless has a right to consider his prior suspensions for tardiness which, by contract, remain in his personnel file for at least two years.

## POSITION OF THE UNION

The Employer did not have just cause to terminate Grievant's employment. The discipline of removal is too harsh and does not fit the violation. Under Section V. E. of the previous tardiness policy of the Employer (Joint Exhibit 4), the Grievant would not

have received any suspension whatever for tardiness because he had completed more than 13 consecutive pay periods in active pay status without an additional tardiness or AWOL offense. That was a reasonable work rule which was unilaterally withdrawn by the Employer.

Grievant's notice of pre-disciplinary conference was confusing and misleading and led the Grievant to believe that he was only subject to suspension, not dismissal. Additionally, Grievant was further misled because all the previous disciplinary suspensions issued against the Grievant indicated that another offense could lead to removal even though he received suspensions, not removal, in all those instances.

The Contract (§13.06) requires the Employer to consider mitigating circumstances surrounding an employee's tardiness. The Employer was on notice of Grievant's medical problems since 1984 but gave them no consideration in dispensing this discipline, a violation of the Contract.

The prior disciplines meted out to Grievant elicited corrective behavior. He had not been tardy for almost a year prior to the four dates at issue in this case. The Grievant has offered reasons for his tardiness. On April 29, 1987, and May 9, 1987, he was tardy due to illness arising out of changes in his medication. On May 13, 1987, he was tardy because his automobile broke down. On May 22, 1987, he was only four minutes late, which is less than the six minutes late which presently constitutes an incident of tardiness (Joint Exhibit 1, p. 5). Contrary to the assertions of the Employer, documentation of the

medical reasons for the tardiness of April 29 and May 9 was furnished to the Employer at that time.

The Grievance should be sustained. The Grievant, Robert Sargent, should be reinstated and the discipline in this case should be modified.

## FACTUAL BACKGROUND

Robert Sargent commenced employment for the Employer as a Hospital Aide at the Cleveland Developmental Center on October 6, 1980. He remained in that capacity until June 6, 1983, when he became a Delivery Worker at Broadview Developmental Center, the position he held until his dismissal effective July 6, 1987. The immediate basis for Mr. Sargent's removal was listed on the removal order (Joint Exhibit 2-4) as four instances of tardiness totalling one hour and forty-eight minutes in the time period between April 29, 1987, and May 22, 1987. The Grievant has a record of minor discipline for both attendance and non-attendance related problems dating from December, 1983. Since June 1984, the Grievant has received five previous disciplinary actions totalling 68 work days of suspensions for tardiness and absenteeism offenses.

The Grievant's last previous discipline was a 30 day suspension for tardiness which he served in July and August, 1986. That suspension was based on six tardies which occurred between May 10, 1986, and May 29, 1986. The date of the first tardiness incident in the present case was April 29, 1987, some eleven months later. In the interim, between July 22, 1986, and

December 19, 1986, a somewhat more liberal tardiness policy was in effect at Broadview Developmental Center (Joint Exhibit 4). That policy had been supplanted by another disciplinary grid which was in effect at the time of the commencement of this disciplinary process (Joint Exhibits 1, 1-A). The most significant change in policy for discipline of tardiness resulted from elimination of the previous policy (Joint Exhibit 4, Section V. E) which provided that an employee found guilty of a tardiness or AWOL offense would have that offense effectively eliminated from his record if the employee completed 13 consecutive pay periods in active pay status without an additional tardiness or AWOL offense. For the reasons which appear below in the Opinion section of this document, this policy change is not relevant to this arbitration proceeding.

The testimony is in conflict regarding the issue of whether or not the Grievant submitted medical documentation to verify the alleged reasons for his tardiness on April 29, 1987, and May 9, 1987.

## OPINION

It is the conclusion of this Arbitrator that the Employer had just cause to remove the Grievant, Robert Sargent.

By contract, the Employer has the burden of proof to establish just cause for termination of the Grievant (Section 24.01). The ultimate severity of the punishment imposed on this Grievant places the burden on the Employer to demonstrate by at least a preponderance of the evidence proof of wrongdoing

sufficient to support discharge (See, e.g., Elkouri, How Arbitration Works, 3d ed., pages 661-662). The Employer has here satisfied that substantial burden of proof.

The effect of former tardiness policy F/O-19 (Joint Exhibit 4) must be considered. In the opinion of this Arbitrator, if the Grievant had in fact completed 13 consecutive periods in active pay status since May 29, 1986, without another tardiness or AWOL offense, then he would be entitled to have the present tardiness offense considered a first offense. However, this would only be the case if those 13 consecutive pay periods had run prior to the expiration of policy F/O 19. That policy expired on December 19, 1986. Since the Grievant was under suspension between July 14, 1986, and August 22, 1986, he did not meet the definition of "active pay status" for that time period. (Joint Exhibit 4, Section IV. B). Therefore he did not log the necessary 13 consecutive weeks prior to the revision of that policy.

Resort must then be had to the Contract and to the disciplinary grid in effect in June and July, 1987, (Joint Exhibits 1, 1-A) to determine an appropriate discipline within progressive discipline standards. The Contract specifically permits consideration of disciplinary suspensions by the Employer for a 24-month period, more than twice the length of time at issue in this case (§24.06). The disciplinary grid (Joint Exhibit 1-A, Sec. VI. A.) permits the Employer to remove an employee for a fifth minor (Category B) offense, such as tardiness. The Grievant has five previous suspensions for attendance related problems only within the three years preceding

his removal, including four major suspensions of ten days or more. The resulting 68 days of suspension-related absences from the workplace means that, on an average, this Grievant has missed four and one-half work weeks per year due to attendance-related disciplines during his last three work years. Therefore, this Arbitrator is unwilling to seriously entertain the argument that this Employer has not applied either the letter or spirit of the progressive discipline requirements of the Contract.

On the issue of documentation by Mr. Sargent of medically related reasons for two of the tardiness incidents, this neutral finds the testimony of the Employer's witnesses more credible. Despite his longstanding knowledge that this was an issue in this proceeding, Mr. Sargent has failed to produce the evidence which would be available from his medical laboratory to verify his testimony. Under questioning by this Arbitrator he admitted that he has made no attempt to obtain such documentation. This Arbitrator must perforce conclude that no such proof exists.

Nor does this Arbitrator believe that any substantial issue of lack of proper notice of discipline by removal exists in this case. The Contract itslf (§24.02) places an employee on notice of the risk of termination following a disciplinary suspension. On six occasions of suspensions betweeen May, 1984, and July, 1986, each such suspension notice expressly warned the Grievant that another violation could result in his removal. This Arbitrator is unwilling to believe that an inartfully worded sentence in a form notice of pre-disciplinary conference would cause this discipline-hardened employee any confusion whatsoever.

This is especially so in light of the statement in the first line of that notice (Joint Exhibit 2-3) which expressly placed the Grievant on notice of the risk of removal.

## AWARD

The grievance is denied and dismissed.

Thomas P. Michael, Arbitrator

Rendered this Twenty-Eighth 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 on July 28th, 1988, to:

Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11
995 Goodale Boulevard
Columbus, Ohio 43212

David Norris
Office of Collective Bargaining
65 E. State Street
Columbus, Ohio 43215

Steven W. Lieber
Staff Representatative
OCSEA/AFSCME Local 11
995 Goodale Boulevard
Columbus, Ohio 43212

Thomas P. Michael