IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF TRANSPORTATION

AND

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

RICHARD A. KELLEY, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. G-87-0528, Richard A. Kelley

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 Transportation District 3, (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 Office of Collective Bargaining, on May 12, 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:
Rachel L. Livengood Department of Transportation	Brenda J. Persinger Staff Representative OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Was the Grievant, Richard Kelley, Roadside Park Caretaker 1, discipline 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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> * * *
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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 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 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.

POSITION OF THE EMPLOYER

The Employer had just cause to suspend the Grievant, Richard Kelley, for ten days. The disciplinary action at issue is the reult of Grievant's repeated failure to follow the rules and regulations of the Employer. The Grievant was specifically charged with insubordination by willful disobedience of a direct order, failure to follow written policies of the Director, Districts or Offices and neglect of duty. The Grievant was told repeatedly what work was to be done and when it was to be done but yet the Grievant failed to comply. As a result, the roadside rest areas to which the Grievant was assigned were not properly

maintained. The Grievant was on notice of his unacceptable behavior both through the written reports of the District 3 Horticulturist and from the oral warnings of his supervisor.

The ten day suspension in this case is in accordance with the contractual standard of progressive discipline and commensurate with the offense. Mr. Kelley has been given ample opportunities to correct his behavior and his failure to do so has adversely affected the public image of the Department of Transportation.

POSITION OF THE UNION

The Employer did not have just cause to impose a ten day suspension on the Grievant. The Employer has failed in its burden of proof to establish that the Grievant failed to remove graffiti from rest area walls, has failed to identify the specific incidents of alleged neglect of duty, and has failed to identify until the arbitration hearing itself the specific work locations where Mr. Kelley allegedly failed to remove graffiti. Additionally there is not sufficient evidence to establish that Mr. Kelley ever was given a direct order; therefore he could not have been guilty of refusing to obey such an order.

Further even if some discipline is warranted, the ten day suspension meted out to Grievant is excessive. The prior disciplines received by Mr. Kelley predate the Contract and were issued under a lesser standard than is imposed by the Contract.

The suspension should be overturned, all records of this disciplinary action should be removed from his personnel file, and Mr. Kelley should be made whole.

FACTUAL BACKGROUND

Richard A. Kelley, the Grievant, has been employed with the Department of Transportation since August 24, 1981. At the time of the incidents giving rise to the grievance he was classified as a Roadside Park Caretaker 1. His work area was under the jurisdiction of the superintendent of the Huron County garage. On December 18, 1986, the Grievant was issued a ten-day suspension notice (Joint Exhibit 3). That notice listed three violations of Departmental rules:

(1) Neglect of Duty;

(2) Insubordination (Willful disobedience of a direct order); and

(3) Failure to follow policies of the Director, Districts or Offices.

The Grievant worked as a caretaker assigned to two Huron County roadside parks--Clarksfield and Fitchville. He was responsible for the general upkeep and maintenance of the parks and his duties included cleaning and maintaining the restrooms, emptying garbage cans, sweeping sidewalks and parking areas, and lawn mowing. (Joint Exhibit 7).

On October 31, 1986, Dennis Hay, Superintendent of the Huran County Garage, confronted the Grievant at the Clarkfield roadside park and complained about the Grievant's failure to clean graffiti from rest room walls. The testimony is in conflict regarding which park(s) Mr. Hay complained about. The Grievant may have also been upbraided by Mr. Hay at or about that time for

neglecting his lawnmowing duties. On November 3, 1986, Superintendent Hay requested that a pre-disciplinary hearing be held for the Grievant for purposes of considering disciplinary action against him. (Employer's Exhibit D).

The parties have stipulated that a properly conducted pre-disciplinary meeting was held on November 24, 1986. The disciplinary action at issue in this proceeding resulted. The grievance herein was filed on December 30, 1986, alleging that the Employer breached its contractual duty to have just cause for imposing discipline as well as violation of the contractual standard of progressive discipline. The relief requested by the grievance is that the Employer adhere to the Contract "...and that Mr. Kelley gets his time back with the documents removed from his file and that he be made whole."

OPINION

The Contract imposes the burden of proof on the Employer to establish just cause for any disciplinary action. The evidence and testimony presented at the arbitration hearing establish that the Employer has demonstrated just cause for imposing discipline against the Grievant, Richard Kelley. However, the Employer has failed to prove the charge that Mr. Kelley disobeyed a direct order; that failure of proof will necessitate modification of the suspension order in this case.

The Union and the Grievant have alleged that the Grievant was unaware until the arbitration hearing itself that Kelley was charged with failure to remove graffiti from the Fitchville

walls. The Grievant testified that he thought Mr. Hay was referring to the Clarksfield walls during the October 31, 1986, confrontation as well as during the Step 3 hearing. The facts convince this Arbitrator otherwise. The Grievant's own letter to the Division 3 District Deputy Director (Joint Exhibit 6) clearly establishes that he was placed on notice at least as early as the pre-disciplinary meeting that "writing on the men's room wall at park 29" was a major basis for this disciplinary action. Park 29 is in fact the Fitchville park. Additionally, the testimony of David Moellenkamp, the District 3 Horticulturist, establishes that Mr. Kelly had been on notice over an extended period of time that his job performance, including cleaning of graffiti, was unsatisfactory. The Field Reports (Employer's Exhibit C) dated September 11, 1986, June 6, 1986, March 28, 1986, September 4, 1985, April 12, 1984, January 6, 1984 and November 29, 1983, all refer expressly to the need to remove writing from the walls at the Fitchville park. Further, Mr. Kelley's performance evaluations (Joint Exhibit 5) almost uniformly indicate that the Grievant needs constant prodding and supervision to assure that he performs his job duties. Finally, the Grievant admitted in the aforementioned letter to the District Deputy Director (Joint Exhibit 6) that domestic problems had caused his work to suffer during the months immediately preceding this disciplinary action.

The Arbitrator has credited the testimony adduced that writing on the walls is a continuing problem at all roadside rest areas. Nonetheless the evidence in this case is overwhelming that the Grievant's work schedule and available cleaning supplies

should have enabled him to perform his duties in a much more thorough manner than that insinuated by the Field Reports and performance evaluations.

Superintendent Hay's testimony regarding his surreptitious observations of the Grievant's poor job performance is bolstered by the Grievant's recognition (Joint Exhibit 6) that Mr. Hay was checking his work "every weekend all summer long."

Without question it has been established to this Arbitrator that the Grievant was guilty of neglect of duty as well as failure to follow written policies of the Employer (i.e., the position description and Field Reports, Joint Exhibit 7 and Employer's Exhibit C).

On the other hand there has been no identification of the time, place or wording of the direct order allegedly disobeyed by Mr. Kelley. Mr. Hay himself, on questioning by this Arbitrator, testified that he could not remember giving a direct order to Kelley to clean the Fitchville walls on October 31, 1986, or during the week prior thereto. He stated that he recalled such an order being issued "a couple months before." This clearly falls short of the proof needed to sustain this charge.

The Grievant had received a three-day suspension in August, 1986, for violations similar to those charged in this proceeding. Therefore, progressive discipline principles would dictate that a similar offense less than three months thereafter would justify a more severe suspension. In fact, if the Grievant had not been unfairly charged with disobeying a direct order this neutral would necessarily find that a ten-day suspension would be

consistent with contractual standards. This Arbitrator must assume, however, that this latter charge played some part in determining the length of the suspension assessed by Director Smith. Therefore the suspension will be modified by three days to reflect that role.

AWARD

The grievance is denied in part and sustained in part. The Employer is found to have had just cause to discipline the Grievant but the term of the suspension is reduced from ten days to seven days.

Thomas P. Michael, Arbitrator

Rendered this Tenth day
of August, 1988, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 1988, the original Opinion and Award was mailed to Eugene Brundige, Director, Ohio Department of Administrative Services, Office of Collective Bargaining, 65 East State Street, Columbus, Ohio 43215; with copies of the foregoing Opinion and Award being mailed to:

Daniel Smith, General Counsel
Brenda J. Persinger
Staff Representatative
OCSEA/AFSCME Local 11
995 Goodale Boulevard
Columbus, Ohio 43212

Thomas P. Michael