

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF
MENTAL HEALTH, WESTERN RESERVE PSYCHIATRIC
HABILITATION CENTER

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Dwight Price (Discharge - Absenteeism)

CASE NUMBER: 23-18-880713-0104

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus

Date: March 29, 1989

APPEARANCES

For the Employer

Ed Morales

Jennifer Dworkin

Milan Djuricic

Henry Primes

Betty Lou Milstead

Labor Relations Specialist

Labor Relations Specialist

Labor Relations Officer

Administrator I

Administrative Assistant I

For the Union

Dwight Price

Steven W. Lieber

Myrl Lockett

John Porter

Robert Robinson

Betty Williams

Grievant

Advocate

Staff Representative

Associate General Counsel

Witness

Witness

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Mental Health, Western Reserve Psychiatric Habilitation Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on January 31, 1989 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

ISSUE

The stipulated issue: Was the Grievant, Dwight Price, terminated from the employment of the Ohio Department of Mental Health with just cause? If not, what should the remedy be? (Joint Exhibit 6)

PERTINENT CONTRACT PROVISIONS

ARTICLE 13 - WORKWEEK, SCHEDULES AND OVERTIME

...

Section 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.

(Joint Exhibit 1, Pgs. 19-20)

...

ARTICLE 24 - DISCIPLINE

Section 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.

Section 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.

(Joint Exhibit 1, Pgs. 34-35)

...

Section 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.

(Joint Exhibit 1, Pg. 37)

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 25.01 - Process

...

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.

(Joint Exhibit 1, Pg. 38)

...

Section 25.07 - Advance Grievance Step Filing

Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may by mutual agreement be filed at the appropriate advance step where the action giving rise to the grievance was initiated. An employee with a grievance involving a suspension or a discharge may initiate the grievance at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

(Joint Exhibit 1, Pg. 42)

CASE HISTORY

Western Reserve Psychiatric Habilitation Center, the Employer, is a long-term mental health facility. It houses approximately three hundred employees and approximately eight

hundred patients. The patients, more specifically, are low functioning and exhibit a variety of psychiatric problems. In terms of patient care, the vast majority of patients require continuous care which necessitates a great deal of attentiveness by those individuals providing patient services.

Dwight Price, the Grievant, has been employed by the facility since June 2, 1980. During his tenure, he served primarily as a Therapeutic Program Worker.

The Grievant's employment history indicates that he has experienced a number of absenteeism and tardiness difficulties. On October 16, 1986, Henry Primes, the Grievant's supervisor, issued a Record of Counseling Interview (i.e., verbal reprimand) for abuse of time. The specific violations dealt with absenteeism, tardiness, and out-of-pay status (Joint Exhibit 5, Pg. 1).

On December 15, 1986, Primes issued a written reprimand for a number of absenteeism incidents and no call and no show violations (Joint Exhibit 5, Pg. 2).

The Employer elevated the level of discipline for a series of violations which took place during January of 1987. On March 24, 1987, the Employer suspended the Grievant for two (2) working days. The Employer noted that this disciplinary penalty was engendered by the Grievant's excessive late call offs, late arrivals, and absenteeism (Joint Exhibit 5, Pg. 3).

On or about March 27, 1987, the Grievant became subject to additional discipline regarding his absenteeism and tardiness problems. The record indicates that in lieu of a suspension the

Parties negotiated an EAP Participation Agreement (Joint Exhibit 3), with the Grievant agreeing to comply with all of the particulars contained therein. It appears that the Grievant attended Southwest General Hospital from May 8, 1987 through May 27, 1987 for chemical dependency. The Hospital, moreover, provided documentation indicating that the Grievant had successfully completed treatment by completing all assignments, attending all classes and groups, and participating in a generally appropriate manner (Union Exhibit 5).

Upon returning to work, however, the Grievant allegedly experienced additional absenteeism-related problems. On June 5, 1987 the Grievant was suspended for six (6) working days. As justification for the suspension the Employer noted the Grievant's unacceptable attendance, continued excessive absenteeism, and his non-compliance with the terms and conditions contained in the EAP Participation Agreement (Joint Exhibit 5, Pg. 4). It should be noted that a grievance was never filed contesting the propriety of the above-mentioned suspension.

On or about January 15, 1988 the Grievant experienced a work-related injury while attempting to restrain a patient. During the altercation, the Grievant was punched several times on his head (Union Exhibit 3). As a consequence, on January 23, 1988, he entered St. Thomas' Emergency Room complaining of severe headaches. Documents introduced at the hearing indicate that he was treated for a contusion to the head with an unresolved hematoma (Union Exhibit 4).

Even though the Grievant's absenteeism and tardiness improved somewhat since the six (6) day suspension, the Grievant allegedly reverted to his old habits. On June 16, 1988, a Pre-Disciplinary Conference was held to discuss the Grievant's unapproved leave and out-of-pay status for the period April, 1988 to June, 1988. As a consequence of this meeting, the Employer removed the Grievant on July 1, 1988. The Order of Removal contained the following pertinent particulars:

"...

Mr. Dwight Price, this is to inform you that you are being removed from state service from the position of Therapeutic Program Worker.

The reason for this action is that you have been guilty of Neglect of Duty. The following particulars to wit: In a 72-day period you were in an unapproved leave, out-of-pay status 18 times - 13 calloffs, three (3) AWOL no call/no shows and reported late for duty twice. You have been reprimanded repeatedly for the same type of offense with no improvement. Repeated discussions emphasizing your attendance problems have been to no avail. Therefore, you are hereby removed from state service.

The Superintendent will notify you of the date of your removal.

Pamela S. Hyde, J.D., Director 7/1/88

..."

(Joint Exhibit 5, Pg. 7)

On July 8, 1988, the Grievant formally contested his removal. The grievance contained the following relevant particulars:

"...

Contract Article(s)/Section(s) Allegedly Violated:

Preamble, Articles 2.02, 24.01; & other pertinent articles.

Statement of Facts (for example, who? what? when? where? etc.):

On 7-8-88 I was removed from my position as TPW at WRPHC. This removal was stated to be the result of my being absent. While it is true that I have been missing work the reason for that is strictly job related. In January of this year I was attacked and hit in the head by a patient and then bumped my head when we hit the ground. I went to a doctor and was told that I may need surgery but since I had not went out on disability when it happend (sic) and I later filed for workers compensation I could not have the surgery done until it was clear whether workers compensation would pay for the surgery or not. It took until June 1988 for me to even get a claim number. In the meantime I did miss work from time to time from the headaches that I was suffering from that was work related.

I wish consideration would be given to the six day suspension that I received in June 5, 1987. This suspension was because I was said to have not completed the EAP program and therefore I received a six day suspension. In reality I had completed the EAP program but because I was unsure as how I was to file the appeal the time frame lapsed. I need my job and I would like to have it back.

..."

(Joint Exhibit 2, Pg. 1)

The Parties were unable to resolve the above grievance at the subsequent stages of the grievance procedure. No objections being raised by the Parties concerning either procedural or substantive arbitrability, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant for Neglect of Duty. The Employer introduced a variety of documents and supporting testimony in its attempt to substantiate the various just cause standards.

The Employer emphasized that the Grievant received

foreknowledge of the possible or probable consequences of his disciplinary conduct. Henry Primes, the Grievant's supervisor, testified that he reviewed the tardiness and absenteeism policies during a counseling interview which led to a verbal reprimand. He noted that he engaged in similar discussion when he issued a written reprimand for related absenteeism and tardiness offenses (Joint Exhibit 5). Primes also referred to a Performance Evaluation instrument (Joint Exhibit 4) where he specified in no uncertain terms that the Grievant's performance was tarnished by his attendance behavior.

Betty Lou Milstead, Administrative Assistant I, provided testimony concerning in-service training received by the Grievant dealing with Corrective Action (Employer Exhibit 3) and Absenteeism, Tardiness, Late Call Off's (sic) and No Call Off Discipline Policy (Employer Exhibit 4). She alleged that the Grievant's Employee/Education Training Record (Employer Exhibit 2) clearly indicated that the Grievant had received training in these policy areas. His actions, moreover, evidenced an understanding of the policies. Milstead, more specifically, stated that the Grievant had previously submitted documentation when applying for leave without pay (Employer Exhibit 5).

The Employer asserted that it had collected substantial level of proof that the Grievant was guilty as charged. The Employer emphasized that the record clearly evidenced that the Grievant was absent for fifteen days, and yet failed to submit Request For Leave Forms and supporting documentation. Similar arguments were submitted regarding the three AWOL incidents.

The Grievant's suggestion that he had other individuals call-off on his behalf was viewed suspiciously by the Employer. Even if other individuals agreed to make these calls but failed to do so, the ultimate responsibility for any call-offs, and proper communication with the facility, was the Grievant's.

Further suspicions concerning the Grievant's credibility were raised as a consequence of the doctor's slip (Union Exhibit 4) submitted by the Grievant. This slip was originally submitted at the third step, and yet, only covered one of the charges levied against him. The Grievant must have known that the documentation was deficient because on previous occasions he had submitted timely supporting documentation.

The Employer raised a threshold objection to the Union's disparate treatment arguments. These arguments were allegedly not raised at any of the lower steps of the grievance procedure. Thus, some measure of surprise was raised and viewed as defeating basic due process notions of fairness.

The Employer argued in the alternative that if the arbitrator upheld the propriety of the Union's disparate treatment arguments, then the Union failed to demonstrate that the cases it presented were sufficiently similar to the present dispute. The Wissmar case (Union Exhibit 6) was distinguished on a number of critical factors. She submitted proper documentation to support her illness contention and her emotional status justified the progressive discipline that was imposed. In a like fashion, the documents submitted in support of the Wiginton comparison (Union Exhibit 7) adequately

supported the degree of discipline administered, and readily distinguished the present case. Finally, Bailey's record (Union Exhibit 8) was viewed as providing support for non-disparate treatment rather than establishing a disparate treatment condition. Bailey merely experienced a period of time where she enjoyed leave without pay status. The Employer claimed that since this leave was purportedly approved, Bailey did not fall within the disciplinary guidelines used to reprimand and remove the Grievant.

The Employer maintained that the degree of discipline administered was reasonably related to the seriousness of the Grievant's proven offense and the record of the Grievant in his service with the Employer. The Employer asserted that the Grievant was provided with progressive discipline and an ample opportunity to change his pattern of absenteeism. The escalating levels of administered discipline (Joint Exhibit 5) and the EAP opportunity (Joint Exhibit 3) were referenced in support of this assertion.

Arguments provided by the Union contesting the propriety of the six day suspension were refuted for a number of reasons. First, the Employer alleged that Section 25.01 (see Pg. 4 of this Award for Article 25 - Grievance Procedure, Section 25.01 - Process) allows an arbitrator to review the merits of a verbal reprimand if the reprimand becomes a factor in a disciplinary grievance. The Parties' intent, concerning reviews, however, does not reach to past suspensions or any other forms of discipline other than verbal reprimands. Second, the Union

never complied with the fourteen day time limit specified in Section 25.07 (see Pg. 4 of this Award for Article 25 - Grievance Procedure, Section 25.07 - Advance Grievance Step Filing). Thus, the Employer viewed the Union's attempt to resurrect the six day suspension as misguided based upon timeliness concerns. It also maintained that disciplinary reprimands not grieved on or about the time of the initial incident should be taken at face value.

The illness contentions raised by the Union were not viewed by the Employer as sufficient examples justifying mitigation of the disciplinary action. The evidence allegedly indicated that the Grievant employed his injury as a pretext. A pretext used to camouflage the Grievant's unwillingness to work on weekends or on days surrounding regularly scheduled days off or holidays. Other arguments were offered to support the pretext hypothesis. Primes testified that he was aware of the Grievant's injury but was never informed by the Grievant that the injury engendered his attendance difficulties. Surprisingly, the Grievant's attendance pattern improved somewhat shortly following the date the injury was sustained, casting further suspicion concerning the Grievant's assertions. Also, the Grievant never submitted a worker compensation report for the lost time he incurred after sustaining the injury.

The Position of the Union

The Union argued that the Employer did not have just cause to remove the Grievant and provided a series of arguments alleging violations of various just cause standards.

The Union claimed that the removal was improper because the Employer failed to conduct a fair and objective investigation of the circumstances surrounding the alleged violations. The Union placed a great deal of emphasis on the violations listed on an IOC (Joint Exhibit 5) used to support the removal and the Grievant's attendance record (Employer Exhibit 6). Discrepancies indicated that proper investigation procedures were not engaged in by the Employer.

The Union maintained that the penalty assessed was unreasonable and excessive. The Grievant's improved attendance record after the six day suspension was referenced in support of this contention. Allegations dealing with the pattern of the Grievant's absenteeism record were also refuted. The Union, more specifically, claimed that the Grievant was never charged with such a violation, and therefore, in reviewing the present matter these charges should not be considered. The Grievant's participation in the EAP also rendered the removal decision as excessive. The Union noted that the Employer never clearly justified the six day suspension by citing specific violations of the EAP Agreement (Joint Exhibit 3). Thus, progressive discipline principles were violated when the Grievant was ultimately removed because the prior reprimand (i.e., the six day suspension) was erroneously administered.

The Union asserted that the Employer failed to apply its rules and penalties even-handedly and without discrimination. The Union claimed that this argument was initially raised at the third step of the grievance procedure and was therefore properly

before the Arbitrator. Also, by specifying the just cause issue in the grievance form (Joint Exhibit 2), disparate treatment claims become relevant because they represent a critical aspect of the just cause standard.

Attendance records of three other employees (Union Exhibits 6, 7, and 8) were introduced in support of the disparate treatment argument. These employees were viewed as similarly situated in terms of their absence profiles when compared with the Grievant's attendance record. Yet, they allegedly received much more lenient penalties, none of which exceeded six day suspensions.

The Union also questioned the propriety of the administered discipline in light of several mitigating factors; factors which should have been considered based upon terms contained in Section 13.06 (see Pg. 3 of this Award for Article 13 - Workweek, Schedules and Overtime, Section 13.06 - Report-In Locations). First, the Grievant's successful completion of the EAP and the medical attention received as a consequence of the injury provided sufficient justification for some of the absences. Second, the Grievant experienced an entire year without an incident prior to his removal. Thus, the various progressive discipline strategies initiated by the Employer resulted in positive behavioral changes. Last, similar circumstances were considered when other employees were disciplined and should be given like consideration in this instance.

THE ARBITRATOR'S OPINION AND AWARD

It is this Arbitrator's judgement that the Employer did have just cause to remove the Grievant. This conclusion was based upon an analysis of the evidence and testimony as they pertain to critical features of just cause.

A critical factor considered by the Arbitrator deals with the relevancy of the six day suspension. This suspension, more specifically, was given considerable weight by this Arbitrator because it represents an important and crucial aspect of the progressive discipline process. The Arbitrator, however, is hard pressed, at this late date, to review the propriety of the suspension when the Union and the Grievant failed to question the suspension at the time of implementation. It is a well-established arbitral axiom that once an employee is given notice of an adverse entry in his record, and the employee fails to file a grievance even if nothing precludes a filing, such entries are typically accepted on their face without a review of their merits.

Arbitrators typically distinguish between two broad absenteeism categories. Casual absenteeism refers to intermittent or short-term absences of one, two, or three days. Extended absenteeism, however, refers to a relatively fixed or lengthy period of absence ordinarily prompted by illness or injury. In the instant case, the Union has argued that the Grievant's casual absence behavior has been partially engendered by the Grievant's head injury. A critical review of the circumstances surrounding this matter fail to support the

Union's contentions.

The Grievant's injury justification is not supported by the record. The altercation with the patient took place on January 15, 1988 (Union Exhibit 3), yet, the Grievant's attendance problems did not truly surface until April, 1988 (Employer Exhibit 6, Joint Exhibit 5). It is indeed difficult to believe that an injury laid dormant for approximately two months before it severely impacted the Grievant's attendance behavior. The credibility of the Grievant's allegation is further hindered by the medical documentation offered in support of his contention and his own statements. The doctor's excuse (Union Exhibit 4) offered into evidence does not excuse the vast majority of absenteeism and tardiness incidents accumulated for the period April 2, 1988 to June 11, 1988. The excuse, moreover, does not indicate that the injury may engender extended periods of absenteeism outside the individual control of the Grievant.

It is evidently clear to this Arbitrator that the Grievant's attendance problems were entirely within his control. A number of justifications were offered by the Grievant in his attempt to support his actions. He stated that depression prevented him from providing accurate documentation. He also noted that he did not submit paperwork because he had exhausted his available personal leave, vacation, and sick days with respect to the AWOL allegations. The Grievant placed the blame on other individuals who had failed to call in on his behalf. The variety of excuses offered as justifications merely reduced the Grievant's credibility and heightened the propriety of the

Employer's administrative decision.

All of these excuses are viewed as examples of incorrigible behavior; behavior which cannot be condoned nor modified by continued progressive discipline attempts. The Grievant was fully cognizant of the policies and procedures dealing with approved leave without pay (Employer Exhibit 5). Even if he exhausted the various leave pools available to him, he was obligated to provide supportive medical documentation in an attempt to mitigate the negative connotations associated with his actions. The pattern of absenteeism also reduces the veracity of the Grievant's excuses. Under cross examination, the Grievant justified his absences because weekend work was more difficult than work conducted during the normal workweek. Thus, this Arbitrator is led to believe that a certain number of absences were preventable if the Grievant had met his weekend obligations. A responsible employee, moreover, would not place his job in jeopardy by asking others to fulfill certain employee specific obligations such as abiding by properly promulgated and clearly understood call-in procedures. Even if the Grievant did in fact solicit this aid, failure by his agents does not reduce his obligations or his responsibilities to his Employer and the patients housed in the facility.

The Union's attempts to discredit the Employer's removal decision by noting certain discrepancies between the violations listed on a Pre-Disciplinary Conference Notice (Joint Exhibit 5) and data contained in the Grievant's attendance record (Employer Exhibit 6) are viewed as unpersuasive. If a limited number of

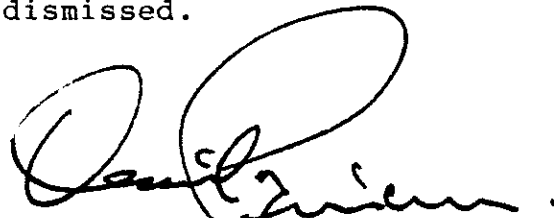
errors exist in either of these two documents, these errors do not undermine the underlying premise which justifies the Grievant's removal. In several instances the attendance record (Employer Exhibit 6) indicates that the Grievant was sick and requested vacation time without proper supporting documentation, while the Notice (Joint Exhibit 5) indicates that the Grievant failed to report to work without properly calling in. Both of these occurrences, however, evidence unexcused absence behavior and further underscore the Grievant's absenteeism tendencies.

The Union failed to properly support its disparate treatment claim. In order to support this premise the Union had to establish that penalties for the same misconduct, under similar circumstances, have not been reasonably consistent. In this particular instance, the Union failed to establish that the individuals used for comparison purposes were similarly situated. None of these individuals had entered an Employee Assistance Program. A review of the supporting documents, moreover, did not indicate that the attendance and/or disciplinary records were sufficiently similar to warrant identical disciplinary penalties. Wissmar's record (Union Exhibit 6) is of particular interest because she did submit supporting doctor's statements and a Union witness acknowledged that she was suffering emotional problems. The other examples discussed by the Union lacked sufficient specificity for comparison purposes and were therefore not viewed as relevant comparisons. The mere introduction of documents does not establish the similarity of circumstances. A thorough and

complete comparison, by competent and knowledgeable witnesses,
is essential if the Union hopes to establish a disparate
treatment condition.

AWARD

The grievance is denied and dismissed.

A handwritten signature in black ink, appearing to read "David M. Pincus", written over a horizontal line.

Dr. David M. Pincus
Arbitrator

March 29, 1989