In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Ohio Department of
Transportation

Employer.

Grievance 31-08(89-02-01)12-01-06

Grievant (D. Badgley)

Hearing Date: January 2, 1990

Award Date: February 19, 1990

Award Date: February 20, 1990

For the Employer: Dennis Van Sykle

For the Union: Mike Temple

Present at the hearing in addition to the advocates named above, the Grievant, was Glen F. Switzer (ODOT) (witness and Employer representative).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the

Arbitrator. All witnesses were sworn.

Joint Exhibits

A. Grievance trail
   1. grievance (dated 1-20-89, received (2-6-89)
   2. request for step 3 meeting (dated 1-23-89, received 2-1-89)
   3. step 3 response (2-27-89)
   4. grievant's written statement (11-8-88)
   5. step 4 response (3-24-89)
   6. arbitration demand (3-14-89)

B. Prior discipline
   1. written reprimand (11-7-84)
   2. verbal reprimand notation (1-29-85)
   3. written reprimand (4-23-85)
   4. 3-day suspension (7-26-85)
   5. 15 day suspension order 3-24-86 (15 days later modified by SPBR)
      Administrative Law Judge report and Recommendation/cover 8-25-86
      10 day suspension order - SPBR (9-11-86)
   6. written reprimand (3-14-88)

C. Pre-disciplinary notice (12-7-88)

D. Current 15 day suspension order (1-17-89)

E. ODOT Directive A-301 (6-1-87)

F. ODOT Directive A-207 (6-21-85)

G. OCSEA/AFSCME Contract (1986-1989)

Stipulated Facts

A. The grievant is currently a Highway Worker 2, employed by the Ohio Department of Transportation, District 8, assigned to the Clermont County Garage.

B. The grievant has been employed by ODOT since 6-6-82.

Agreed Statement of the Issue

Was the 15 day suspension issued to the grievant for just cause; if not, what should the remedy be?

Relevant Contract Sections

§ 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.

§ 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.

§ 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.

§ 24.05 - Imposition of Discipline

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.

§ 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.

Procedural Issue

At the hearing, the Union raised the issue of a violation of § 24.06. The Union claimed that the Union had not been notified of the written reprimand of 3-14-88 and that this lack of notification (as required under § 24.05) voided the discipline. Therefore, with the discipline of 3-14-88 voided, the Grievant's last discipline would have been on April 24, 1986. Under § 24.06 all previous discipline would have been removed from the Grievant's personnel record on April 24, 1988 so that at the time of this discipline no prior discipline would have remained. Management claimed that the

procedural issue was never raised until the hearing and hence, Management received no notice to defend on this issue and claimed "unfair surprise".

The notice of 3-14-88 was included in the joint exhibits (B-6) (See appendix). The notice was signed by the Grievant, by the Employer representative (Switzer), and witnessed by a second employer representative (Hancock). The notice was copied to "Hershel Davidson, William Fair, Carl Best, Personnel File, and File". The grievance (A-1) does not cite § 24.05 nor § 24.06. The Notice of Hearing (Item C) listed prior discipline (4-23-85 through 3-14-88) and stated that "in view of your prior record". That notice was copied to OCSEA Chief Steward. At the Step 3 Hearing, the hearing officer in stating the **Union Contention** stated that the Union's defenses were "mitigating circumstances" and lack of progressive discipline because "the last violation was a written reprimand issued March 14, 1988." (A-3) (The Arbitrator is mindful that the Step 3 Hearing report is written by an Employer representative.) At the Step 3 Hearing, two Union personnel were present. The April 24, 1989 Step 4 Grievance Review stated "These two incidents occurred after you had already four incidents of discipline on file, three of which relate to attendance." This Notice was copied to the Executive Director OCSEA and the Field Representative. Immediately prior to the Arbitration hearing, the Union representative struck the words "and is without procedural defect" from the joint statement of facts.

The reliance of the Employer on prior discipline was evident

from the outset to the Union. The failure to assert the alleged procedural defect prior to the arbitration hearing constituted unfair surprise to the Employer. Without notice, the Employer was at a serious disadvantage. Moreover, while the Union raised the presumption that the 3-14-88 was not copied to the Union, the Union did not prove its point with a copy of the original or testimony. Moreover, the Employer cast doubt on the credibility of the exhibit.

Notice to the Union of final discipline is mandatory under § 24.05. What consequence should occur for such a violation need not be decided in this case because the Union failed to raise the issue on numerous occasions below.

Substantive Facts

The Grievant is a Highway Worker II who began his employment with ODOT on July 6, 1982. On October 7, 1984, he was counseled with regard to lateness and absences. On 11-7-84 he received a written reprimand for 29 AWOL hours. On 1-29-85, he received a verbal reprimand for 21 tardinesses. On April 23, 1985, he received a reprimand for being late four (4) times in a 10 day calendar period. On July 26, 1985, he received a 3 day suspension for sleeping on the job on 1/20/86. On March 14, 1988, he received a written reprimand for a late call off (1.4 hours). In that written reprimand, the Grievant was warned "should you further violated Directive A-301, you will subject yourself to more severe

disciplinary action, up to and including dismissal."

On November 4, 1988 (Friday), the Grievant neither appeared for work nor called-off. He was cited with 8 hours AWOL. On November 15, 1988, the Grievant called off late (8:10 a.m.) and claimed that he was ill and was going to the doctor.

The Union claimed mitigating circumstances to these two infractions. The Grievant claimed that on November 3rd (Thursday) he drove with his brother to Tennessee to pick up some furniture. The alleged drive by his testimony was 4-5 hours roundtrip. The Grievant's quitting time on Thursday was 4:00 p.m., and his shift time on Friday was 7:30 a.m. The Grievant alleged that during the night on the return trip, the vehicle broke down, and he and his brother were stranded. Moreover, he claimed he never during the night nor following day had access to a phone in order to report off.

With regard to the 11-15-88 incident, the Grievant testified that he left his house on the way to the doctor planning to call off from the gas station but the phone at the station was non-functional. He said he returned home and called off, albeit late. To substantiate his illness on 11-15-88, the Grievant submitted a doctor's statement dated 11-19-88 stating that 11/14 - 11/17 the Grievant had "acute viral syndrome". His return to work was noted as 11/18.

Discussion

The Arbitrator finds no mitigating circumstances.

Driving 4-5 hours after work on Thursday when he was due at work on Friday at 7:30 a.m. was irresponsible on its face. Moreover, the Grievant's testimony about his inability to report-off borders on the incredible. The failure to call off on 11/15/88 makes little sense from the Grievant's testimony. Why not call off at home? Moreover, the doctor's excuse does not directly meet the issue. The Employer had just cause to discipline the Grievant.

Was a 15 day suspension progressive? and commensurate?

Between November 7, 1984 and November 15, 1988, a four year period, the Grievant was counseled and disciplined for 6 infractions involving tardiness, late call off, AWOL, etc. (10-7-84, 11-7-84, 1-29-85, 4-23-85, 7-26-85, 3-14-88). He also had a discipline for sleeping on the job (4-24-86, 10 day suspension).

Looking at similar violations the Grievant had 5 instances between 10-7-84 and 7-26-85, a 9 month interval. Six months later he is disciplined for sleeping on the job, a very serious violation. Nearly two years later (3-14-88) he is disciplined (written reprimand) for a very late call off. This infraction occurred nearly 2-1/2 years after his last similar offense. Then 9 months later comes the infractions which are the subject of the

Grievance (15 day suspension). The Union claims the 15 day suspension is not commensurate nor progressive. Facially a jump from a Written Reprimand to a 15 day Suspension seems to be not progressive in the technical sense. However, some factors weigh heavily in favor of such a jump, i.e., a) two similar infractions within 11 calendar days, b) the irresponsibility connected with the 11-4-88 AWOL, c) the lack of corroborated evidence to uphold the 11-15-88 incident. Moreover, in the interim between tardiness/late call-offs, the Grievant was caught sleeping on the job.

The Arbitrator having found just cause must be careful not to improperly substitute her judgment for the employer's. Under all the circumstances, the Arbitrator might have chosen a lesser penalty; however, the Arbitrator cannot say that given the circumstances, that the discipline is improper under the standards of the contract.

Grievance denied.

February 20, 1990
Date

Rhonda R. Rivera
Arbitrator